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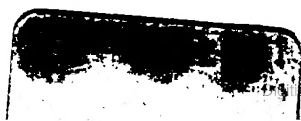
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ALSOP

v.

SOUTHERN EXPRESS CO.

(North Carolina Supreme Court, November 25, 1889.)

Carriers of Goods—Tender of Freight—Time—Construction of Statute.—The words "whenever tendered" in section 1964, N. Car Code, which provides that "agents * * * of railroads and other transportation companies whose duty it is to receive freights, shall receive all articles of the nature and kind received by such company for transportation, whenever tendered at a regular depot, * * * and shall forward the same by the route selected by the person tendering the freight under the existing laws," cannot be limited further than to require that the tender shall not be made outside of reasonable business hours, and the words "under existing laws" must be construed as qualifying the word "forward," and not the right of a shipper to tender goods under the statute.

Same—Reasonable Regulations—Express Company.—A regulation of an express company prohibiting its agents from receiving money for transportation except on the same day of, and prior to, the arrival and departure of trains going to the point of destination, is in violation of the North Carolina statute and illegal.

MERRIMON, C. J., dissenting.

CIVIL action, brought in the court of a justice of the peace, to recover a penalty of \$50, under the provision of section 1964 of the Code, and heard on appeal to the superior court of Halifax, before MACRAE, J., on the following case agreed: "(1) The defendant is a common carrier and transportation company, duly chartered, and doing business in the state of North Carolina. (2) That on the 9th day of January, 1889, the plaintiff tendered to the defendant's agent, at Halifax, (a regular station on the Wilmington & Weldon Railroad Company line, from which the defendant company shipped freight by express), whose duty it was to receive freight and money at said station for shipment, the sum of \$70 in money, for shipment by said company to Battleboro, a station at which there was an express office and agent; and the agent declined to receive the same on said day. (3) The defendant company, by virtue of their charter, were regular carriers engaged in the transportation of money and other articles by express.

(4) That, when said money was tendered for shipment to the defendant's agent, he informed the plaintiff that he could not receive it for shipment on that day; that an order had been issued a few days previous, from the superintendent of the company, directing the agents not to receive money for shipment by express, unless the same was tendered prior to the arrival and departure of the train going in the direction of the point of destination on which the company shipped such articles. (5) That the said money was tendered to the agent for shipment after the departure of the train for Battleboro; and that the agent informed the plaintiff that he would receive said money on the following morning, and transport it to its destination. (6) That there was only one train passing Halifax, going toward Battleboro, during the day of tender, on and by which the defendant transported express. (7) That said money was received for shipment two days thereafter, and shipped by defendant to its destination. (8) That the notice to the agents of the company not to receive shipments of money, unless tendered prior to the departure of the train, was sent out in the form of a circular letter to the agents; and that the public had not been notified of such notice, nor did the plaintiff know of such regulation until so informed by the agent. (9) That the train for Battleboro left Halifax at 12:55 P. M., and said money was tendered at 2 P. M., on said 9th day of January." On the foregoing facts agreed, it was considered by the court that the defendant is a transportation company within the meaning of section 1964 of the Code, and that money was an article of the nature and kind received by such company for transportation. It was further considered that said company might receive money for transportation, under reasonable regulations as to the time during the day when it would receive the same; and that it was reasonable to require that money tendered for transportation to said company should be tendered before the arrival and departure of the train on which the same was to be transported. Judgment against the plaintiff for costs, and that the defendant go without day. Plaintiff appeals.

R. O. Burton, Jr., for appellant.

W. H. Day for appellee.

AVERY, J.—This controversy depends upon the construction given to section 1964 of the Code, which is as follows:

Statute. "Agents or other officers of railroads and other transportation companies, whose duties it is to receive freights, shall receive all articles of the nature and kind received by such company for transportation, whenever tendered at a regular depot, station, wharf, or boat-landing, and

shall forward the same by the route selected by the person tendering the freight under existing laws, and the transportation company represented by any person refusing to receive such freight shall be liable to a penalty of fifty dollars; and each article refused shall constitute a separate offense."

The plaintiff tendered to the defendant's agent at Halifax, (a regular station on the Wilmington & Weldon Railroad line, from which the defendant company shipped freight and money,) \$70 in money, for shipment to Battle-

Facts.

boro, another station on said line of railroad, at which the defendant company had an office and an agent; and the agent refused to receive it, because the company had ordered its agents not to receive money, except on the same day of and prior to the arrival and departure of trains going in the direction of the point to which the shipment was destined. The tender was made at 2 o'clock P. M., and a train carrying express freight had passed at 12:55 o'clock P. M., on the same day. According to the schedule, the next train by which the defendant shipped money and freight would pass on the next day, at 12:55 o'clock P. M.

If the parties had not so agreed, the law would have determined that money was an article of the nature and kind usually received by express companies for transportation, and, moreover, that it was the peculiar business of corporations of this character to carry money, and small but valuable packages. South-

Duty of express company to carry money.

ern Express Co. *v.* St. Louis, I. M. & S. R. Co., 5 Myer, Fed. Dec. 670. While express companies, as declared by Justice MILLER; (Southern Express Co. *v.* St. Louis, I. M. & S. R. Co., do not carry bulky freight, it is not the business of railway companies to carry money; and the latter cannot be held liable for its loss, while being transported in the trunk of a passenger, beyond what a prudent man would deem proper and necessary for traveling expenses. *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69. So that it is peculiarly the business of express companies to carry and collect money along the lines of our railways. The meaning of that portion of section 1964 of the Code that is material to the settlement of this controversy would not be plainer, if, by dispensing with verbiage that is unnecessary, because applicable to other corporations, it should be summarized thus: "Agents or officers of express companies shall receive money, whenever tendered for shipment at a regular station, where such companies have agents, and are accustomed to receive goods for transportation." If we adopt this fair and reasonable interpretation of the language of the law, it would only remain for the court to decide whether the regulation with regard to

hours of business is reasonable, and one that would be sustained, as within the purview of the powers of the company.

When we had banks issuing bills under charters granted by the state, they were required to redeem their bills, when tendered, with gold or silver coin; but the courts construed the requirement to mean when offered for redemption within such business hours as the banks had a right to prescribe. But it has been held that these hours must be reasonable, and adapted to the peculiar nature of the business that the corporation is transacting with the public in general. In *Marshall v. American Express Co.*, 7 Wis. 1, the court held that, though a bank might prescribe hours of business from 9 A. M. to 4 P. M., yet they could not compel an express company to conform strictly to such hours in the delivery of money; and that a tender to the bank of money packages at 5 P. M. would be good, if the jury found that a reasonable hour for making it. In *Marshall v. American Express Co.*, *supra*, the court say: "It was therefore very proper for the parties to prove, and the jury to consider, the usual mode of doing the particular business in question, [that of receiving and forwarding packages by express] in reference to the time of the arrival and departure of trains with which the parties (consignor, consignees, and carriers) in this case are shown to be familiar. Because notes due the bank on a particular day must be paid before the usual hour of closing the bank on that day, it by no means follows that a mechanic making repairs on its building must quit work at that hour, or that he must present his bill within the prescribed period." While granting the power of the bank to make reasonable regulations generally, the court say, further: "The rules prescribed, and the hours of business designated, must be reasonable, and adapted to the exigencies of the particular kind of business in reference to which they are established." Such was the view of the common law, presented with irresistible force and great clearness by the learned judge who delivered this opinion, now cited as the leading case, upon the right to establish hours of business and upon the question whether, when prescribed, the law will enforce conformity to them, as reasonable, on the part of other persons and corporations dealing with the framers of such regulations.

Transaction
of business
during reasonable
hours.

It will be noted that the court there held that a tender at a reasonable hour, and a refusal to receive by the bank, relieved an express company of the responsibility of insurers, and changed their relation to the bank to that of a mere mandatory, liable for gross negligence only, though the teller of the bank to whom the money was offered declared that his

bank had a regulation as to hours, and refused to receive it because of such rule, and because the cashier was absent, and had the key to the safe. But, in the face of a statute requiring them to receive money "whenever tendered," the defendant company's agent should not be allowed to meet the plaintiff, who comes to deal with him by invitation, and decline to receive his money for shipment because of a regulation of his company declared reasonable, "under existing laws." Such a rule would enable the defendant company, by late receipts and speedy delivery, to rid itself of responsibility, and reap the rewards of its work, with the minimum of risk, at both ends of the line. It is clearly a question for the jury, under the instructions of the court, in cases like this at bar, as it was in that, to determine whether, looking to the custom of business men generally at the particular place (here, Halifax) as to hours of repose and times of taking meals, the tender at 2 o'clock P. M. was made at a reasonable hour. The most liberal construction would not allow the courts to limit the operations of the words "whenever tendered" by supplying any other ellipsis after them than "within the usual hours adopted by the public for the transaction of such business at the place where the tender is made." This rule avoids the inconvenience of offers of goods at midnight, or at meal-time, while it steers clear of the other extreme of neutralizing the force of the whole enactment by holding that the words "under existing laws," in the next clause of the section, limit the time of tender as of forwarding, and that the old common law governing the receipt of goods by boats and wagons still exists, and is applicable to-day to these gigantic corporations.

The study of the several statutes relating to the receipt and shipment of goods by corporations will shed further light upon the legislative intent in enacting section 1964 of the Code. By the act of 1871-72, c. 138, § 35, (Code, § 1963, it was prescribed that railroad companies should furnish sufficient accommodation for such freight and passengers as should, "within a reasonable time previous thereto, be offered for transportation," and should be liable in damages to the party aggrieved for neglect or refusal to provide such means of transportation. Subsequently the legislature seems to have realized that the requirement to furnish accommodation within a reasonable time was but a reaffirmance of the common law (leaving the courts to say what time was reasonable,) and passed the act of 1874-75, (Code, § 1967,) fixing the limit of delay in shipment at five days after delivery by the consignor. This law was pronounced constitutional in Branch v.

Statutes relative to receipt and shipment of goods.

Wilmington, etc., R. Co., 77 N. Car. 347, and railroad companies were held liable for the penalty for delay in shipping freight as prescribed in that section. Then it was (when the opinion was rendered in *Branch v. Railroad Co.*, in the year 1877) that the discussion arose as to the right of a consignor to compel a railroad corporation to receive freight when offered for shipment, and store it in its warehouse till cars could be procured to transport it.

The act of 1879 (Code, § 1964,) was passed to meet the suggestion that the ancient principle laid down as applicable to the cumbrous, old conveyances used by common carriers 200 years ago still survived, and conferred on railroad companies the power to compel the shipper to camp with his wagon at the station, and guard his goods till the last hour of time fixed by law, and receive them only when the train was on the eve of departure. But the statute was so drawn as to include not only railroad companies and steamboat lines under the general description, but also "other transportation companies whose duty it is to receive freight," and to require them to receive "all articles of the nature and kind received by such company for transportation, whenever tendered;" thus plainly indicating a purpose to include express companies, because they claimed the peculiar or exclusive right to transport money and goods of certain kinds. The manifest intent of the legislature was to force all corporations coming under the description in the statute to take goods when offered for shipment at a regular station, with the full measure of liability growing out of its custody, even if they should not be shipped till near the expiration of the five days, and then forward them under existing laws, fixing the legal relations of consignor and consignee, and the duties and liabilities of the carrier company and its connecting lines. Evidently the evil intended to be remedied was the refusal to take goods or money immediately when offered for shipment to an agent of one of these companies; and the history of the legislation in aid of shippers but adds emphasis to the unmistakable expression of this purpose. But the construction contended for, that the words "under existing laws" should be construed as qualifying the words "whenever tendered," instead of the word "forward only, would lead, if the common law is correctly interpreted by defendant's counsel in connection with the statute, to the strange conclusion that the obligation of an express company to receive money tendered for shipment remains now just what it was before the act of 1879 was passed; and the company can, under regulations declared reasonable by the courts, still fix the hour of receipt just as it

Construction
of code.

was before, and thus render nugatory by their rules the provision of the law imposing a penalty. Railway companies are inseparably connected with other transportation companies in the act; and therefore it is just as competent for the courts to declare a regulation that compels a consignor to hold his cotton in his wagon for five days, awaiting the arrival of freight-cars, to be reasonable and lawful, as one that forces a person to retain and guard his money till before the departure of a train on the next day. If it is unlawful to force one of these corporations to place in its office or warehouse goods of the nature that it is accustomed to carry, in violation of its regulations, because of the liability incident to its receipt, the rule must apply equally to all others comprehended under the description contained in the section, and clothe all with the power to repeal or modify the law by such reasonable rules as would prove sufficient to obviate the penalty.

But it is further contended that if the companies comprehended under the section in question do not formulate any rules to govern their agents in receipt of freight, the principles of the common law would apply to them; and thus, under this view, the same satisfactory result would be reached by the defendant by holding that the law of to-day, applicable to this new species of transportation agency, which permeates the world with its officers and agents, everywhere delivering money and jewels, and other valuable goods, is the same that governed the receipt of packages by a carrying cart in the time of Bracton, or the tender of goods to a vessel sailing from Liverpool 200 years ago. If, for the sake of argument, it be admitted that the general assembly meant to inaugurate no change, but simply to publish the vain and empty declaration that transportation companies would hereafter, just as heretofore, receive freight under "existing laws," and consequently under any regulation made by the companies and adjudged reasonable by the court, would it follow that the courts would declare the rule under which a wagoner, engaged in carrying goods, could compel his customers to wait till the horses should be hitched, applicable to express companies? The result of giving the sanction of the court to such a rule would be that these companies could induce an individual, by inviting his patronage, to come to one of their regular stations to intrust his money to their care, and then compel him to stand guard over his treasure a whole night, in order to protect the company from a risk that it can better afford to incur than the customer.

But, in order to a proper discussion of this view of the

Common-law
rules—Ap-
plication.

subject, it is necessary to understand that the nature, powers, and liabilities of express companies have been defined by the courts. An express company is a species of common carrier, to which have been accorded important privileges, and which, from the nature of its business, incurs great responsibility.

Powers and
liabilities of
express com-
panies.

These companies originated out of the necessity, in conducting the growing commerce of the world through the agency of railroads and steamboats, for securing the safe carriage and speedy delivery of small but valuable packages of goods and money. *Witbeck v. Holland*, 45 N. Y. 13; 2 Amer. & Eng. Cyclop. Law, 781-784; 5 Myer's Fed. Dec. § 1511. They are essentially different from railway companies, not only in the fact that the latter carry more bulky freight, but they collect money, and do other things that would be held *ultra vires*, if attempted by a railroad company. *Id.* § 1509. It has been held that a railroad company could not refuse to carry for an express company according to the peculiar methods of their business, and would be compelled by the courts to admit the messenger of all of these companies to its cars with their safes on equal terms, and without inspection of their safes. *Id.* §§ 1508, 1519. If a railroad company engage in those branches of the express business authorized by their charter, they must not deny to express companies equal privileges with themselves as to that business. *Id.* §§ 1508, 1515-1521; *Camblos v. Phila. & R. R. Co.*, 9 Phila. (Pa.), 411; *Texas Express Co. v. Texas & P. R. Co.*, 6 Fed. Rep. 426; *Messenger v. Pennsylvania R. Co.*, 18 Am. Rep. 754; *Southern Express Co. v. St. Louis, I. M. & S. R. Co.* 10 Fed Rep. 869.

Apart from the construction of our statute, it is the duty of express companies to receive all goods offered for transportation upon the payment or tender of their charges; but prepayment will be considered waived, if not demanded. *New Jersey Steam Navigation Co. v. Merchant's Bank*, 6 How. (U. S.), 344. They are required, too, to have adequate facilities within a reasonable time, and cannot be exonerated for delay on account of increased expense, though not foreseen and not entirely unreasonable. *Condict v. Grand Trunk Co.*, 54 N. Y. 500. An express company could, in the absence of any statutory requirement, refuse goods on account of an unusual rush of business, especially where the goods offered for transportation are of a perishable nature. *Hare, Cont.* 155. But these are the rules without reference to any such enactment as that before us for construction. When goods are received by an express company without any special and valid contract limiting its liability, it insures the safe and speedy personal delivery of the articles received, at

the place of destination, if on its route, or if not, then at the end of its route. *Witbeck v. Holland*, *supra*; Bish. Cont. §§ 432, 591, 596. Even if the goods are placed in a warehouse, and not shipped immediately, the liability as insurers begins on the execution of a receipt for them. 7 Amer. & Eng. Encyc. Law, 546, 558. A high degree of care is required of an express company in the delivery of goods. They must deliver them, as soon as practicable after they reach their destination, within business hours, to the consignee, at his residence or place of business, unless he authorizes or directs delivery to be made at some other place. *Marshall v. American Express Co.*, and *Witbeck v. Holland*, *supra*. After the consignee receives notice from the company of the arrival of his goods, he is not bound to call at the office for them, but need only notify the company of his residence, place of business, or where he may be found; and the liability of the company as insurers remains till delivery or tender of the goods at the place designated, within business hours, and failure to receive or pay charges. *Witbeck v. Holland*, *supra*; 7 Amer. & Eng. Encyc. Law, *supra*, 567-570. If, in the interim between the arrival at its destination and the delivery, as the law requires, a package of money should be stolen from the agent, the company would be liable to the consignee. Supposing that a friend had sent by express \$1,000 from Battleboro to the plaintiff, Alsop, at Halifax, and the latter lived several miles out of the town, we can readily see that it might require more than twenty-four hours for the company to rid itself of liability as a common carrier; and meanwhile it would be strangely negligent to fail to provide a safe for the security of valuable property and money received for its customer, and held as an insurer.

With this review of the relation that the defendant sustains to the public under other circumstances, necessitating the provision at all offices where money is received of the means to make it safe and secure from thieves till delivery, it is submitted that, if this court is to determine, leaving the statute out of view, whether a citizen who comes from the country, unprepared to protect his property from thieves and burglars, shall be required, rather than a company, provided with safes, servants, and secure rooms, to incur the risk of the custody of a sum of money, it should be guided by reason, and look to the situation of the parties, and the preparation that the law intends shall have been made by each or either for assuming the responsibility. Experience has shown that the principles of the common law are pliable; and a few fundamental rules have been expanded so as to furnish the basis of important branches of the law governing us at this day. This is notably true as to corporations.

But, while the ancient landmarks of the law are worthy of veneration, and should be examined with conservative care, in determining how they meet the exigencies of a progressive age, we should not be so subservient to precedent as to blindly follow them when no longer sustained by reason. It strains the faith of the young student when he attempts to follow Lord Coke in his discoveries of all the hidden diversities in the text of Lord Lyttleton; and when we profess to find in the mouldy black-letter volumes of past centuries a principle that with prophetic ken was formulated to meet and solve a problem arising out of the adjustment of the relations between the people and one of the greatest and most useful corporations in the world, we must, if we would avoid shocking the common sense of mankind, find a rule founded on reason. The fact that a captain and crew of a vessel, according to the English authorities, had the right, in the thirteenth year of William III., to refuse to accept freight offered for shipment till the vessel was ready to sail, furnishes no analogy that can be safely applied to govern the relations of the plaintiff and defendant. The case of *Lane v. Cotton*, 1 Ld. Raym. 646, heard at Easter term, 13 Wm. III., decided this principle, and is the only authority cited in *Story, Bailm. § 508*, to sustain the rule announced by the author. It may have been just, at that remote period, to require the shipper, who had protected his goods on the way to the point of delivery, to continue his oversight over them, rather than force a driver, whose attention was required to be devoted to the preparation for his journey, or the master of a vessel, who, with his crew, was engaged in repairing and inspecting it, and laying in supplies for a voyage, to take them prematurely; for that would have made it requisite for them to prepare a place for storage, which they need not otherwise provide. But an express company, as we have seen, incurs from its nature such liabilities as to require a place of storage at every depot, so guarded as to the safety of property consigned to its care; and it is not unreasonable to require the same care of money tendered for shipment during business hours. *Cessante ratione, cessat ipsa lex*. If, therefore, the statute were not written in plain terms, and if the history of legislation on this and kindred subjects did not indicate that the manifest meaning of the language was what the legislature intended to express, still, we ought to bring this question to the touchstone of reason, based upon a broad view of the condition of the parties interested, and decide it as an original one, of first impression, between a new and important public agency and a citizen, just as the English judges considered the question involved

Lane v. Cotton.

in *Morse v. Slue*, 1 Vent. 190, 238 (cited in *Lane v. Cotton*, *supra*,) and bearing in mind that it is more just to impose a risk upon a body politic, abundantly prepared to incur it, than upon an individual, who has placed his goods in peril on the invitation of the corporation. It is admitted that railroad companies have the power to provide different cars for excursionists, who purchase tickets at reduced rates, from those occupied by passengers paying more per mile, and also that they have the right to assign a separate car for colored people, as decided by this court; but, should our legislature pass a law prohibiting in plain terms such discrimination, the courts would be compelled to enforce the law, if not pronounced unconstitutional. Such a law could not be ignored utterly in a discussion of these subjects after its passage. It seems, therefore, safe to conclude that:

1. The first clause of § 1964 is in itself a full and complete expression of the legislative intent that goods shall be received whenever tendered; and that the language cannot, by any accepted rule of interpretation, be limited further than to require that the tender shall not be made during hours that can reasonably be claimed, according to usages of business men at the place of tender for repose, or for taking meals.

Conclusions
of court.

2. The words "under existing laws" can be construed to qualify the word "forward," and to mean that, at least when the law is applied to railroad companies, the goods shall be shipped within five running days from delivery, as required by the Code, § 1967, and subject to the law fixing the relations of consignor, consignee, the carrier, and its connecting lines, while the construction contended for would give to the statute no effect, but leave the law as it was before its passage.

If no statute had been passed, the courts could not, when the conditions and the relation of plaintiff and defendant are so widely different from those existing between the carrier of the last century and his customer, declare that an express company could not be compelled to receive goods till the hour of shipment, in conformity to the ancient rule, or that the transportation company could arbitrarily determine, by regulations prescribed for the government of its agents, exactly how it would, *ex gratia*, or with a view entirely to its own convenience, allow a departure from the old rule by giving further time. There is error. As the defendant did not rely affirmatively on the defense, or insist on a finding that the tender was at a time other than in business hours, the judgment on the facts found must be for the plaintiff.

CLARK, J., (*concurring*).—At common law, common carriers

were under no compulsion to receive goods or freight till ready to ship the same. *Lane v. Cotton*, 1 *Ld. Raym.* 652. Nor, after acceptance of the goods for shipment, were they liable for delays, if the goods were shipped within a reasonable time, and what was a "reasonable time" depended upon the facts and circumstances surrounding each particular case. These regulations sprang out of the former condition of things, when the modes of transportation were of a more primitive order. The law-making power in this state has modified the common law rule in both particulars. In 1874-75, the legislature enacted a statute, which is now § 1967 of the Code, making a delay of more than five days in shipping the goods after accepting them *per se* unreasonable delay, and affixing a penalty of \$25 for each day's delay beyond that limit. This act has been held constitutional, and found judicial construction, in several cases with which the profession is familiar. *Branch v. Wilmington & W. R. Co.*, 77 *N. Car.* 347; *Keeter v. Wilmington & W. R. Co.*, 86 *N. Car.* 346, 9 *Am. & Eng. R. Cas.* 165; *Branch v. Wilmington & W. R. Co.*, 88 *N. Car.* 570. It still remained in the power of common carriers to nullify the act of 1874-75 by exercising their common law right of not receiving goods till their own conveniences should be suited, or they were in readiness to ship. For this reason, doubtless, the legislature passed the act of 1879 (now § 1964 of the Code), which provides: "Railroad and other transportation companies, whose duties it is to receive freights, shall receive all articles of the nature and kind received by such company, for transportation, whenever tendered at a regular station," etc. The words "whenever tendered," upon a reasonable construction, signify "whenever tendered" in the ordinary business hours of such companies at the place of tender. If the object had been to prescribe merely the place where the tender should be made, there was no mischief or complaint to be remedied; and, besides, in that case the statute would have naturally read, "if tendered at a regular station," etc. "Whenever tendered" has, clearly, reference to the time of tender, and to the common law rule which gave the carrier the right to defer accepting the goods until ready to ship. The regulation adopted by the defendant company, that it will only receive packages each day just before the departure of the train going in the direction of the desired shipment, is in direct conflict with the statute. To give it validity would enable transportation companies, by regulations adopted in their own interest and for their own convenience, to repeal an act of the legislature passed in the interest of and for the convenience of the pub-

lic. A very analogous case is the decision in *Branch v. Wilmington & W. R. Co.*, 88 N. Car. 573, 18 Am. & Eng. R. Cas. 621, which held to be invalid an agreement or regulation, "goods to be shipped at the convenience of the company," which had been inserted by the defendant in its bills of lading, in hope of avoiding the penalties of § 1967. The words "whenever tendered" were evidently intended for the benefit of shippers, and in derogation of the common law rule. It is our duty to give the statute such construction as will effectuate the legislative will. Should the execution of the statute, according to a fair and legitimate construction of it, impose any hardship upon transportation companies, the remedy is to be sought in a modification of the act by the legislature, and not in the virtual repeal of it by judicial construction. In the increasing competition for shipments, few cases of failure to accept goods "whenever tendered" will arise, unless at points where a company has a monopoly; and it is for those very points that the protection of the law is most needed to secure such conveniences as the public demand. At competing points, where no monopoly of business exists, the law of competition will usually furnish the public all needed facilities.

MERRIMON, C. J., (*dissenting*).—I do not concur in the opinion of the court, and will state some of the grounds of my dissent.

The defendant is a common carrier of numerous kinds and classes of freight, including gold and silver, coined and uncoined, treasury notes, bank notes, public and private securities, gems, jewelry, and the like. It is not, however, such carrier of all kinds and classes of freight. It carries mainly such as require to be transported quickly, and generally such as are not very ponderous. A leading and distinctive feature of its purpose is to transport and deliver such freight as it carries certainly, promptly, and expeditiously. It is not a warehouseman, or depositary of freights of any kind. It simply and only receives the same for such transportation, and it holds, or should hold them, for that purpose as short a time as practicable, in the orderly course of business. In the nature of its business, it is to be charged with freights for the purpose, and only for the purpose of transportation, and liabilities properly incident thereto. It has the right to prescribe reasonable and appropriate rules and regulations, not in contravention of law, for the conduct of its business, having in view the safety, protection, and preservation of freights carried by it, and, as well, the protection of itself against fraud, injury, and undue risk and liability.

Nature of express business.

It may require that shippers shall deliver their articles to be transported within a reasonable time next before, in the order of business, the same shall be put on the vehicle or means of transportation,—usually railroad cars,—and sent on the way to their destination. **Obligation to receive goods.** The shipper has no right to compel the defendant to accept freights an unnecessarily and unreasonably long while before the time of starting the same on the way. Thus, if the train of cars on the railroad should start at 12 o'clock M., the shipper could not compel the defendant to receive ordinary express freight the evening next before that time, and thus compel it to assume the risk of keeping it during the night and morning following. This is so, because the nature of the business does not require that the defendant shall have the freights during that time, and such risk does not come within the nature and purpose of the defendant as a common carrier. It has the right, by appropriate and reasonable regulations, to require that the articles to be shipped shall be delivered to it within the time necessary to enable it to ship the same by the express on its next ensuing trip. Reasonable time to prepare the freight for such shipment must be allowed. No more can be required for the mere convenience or advantage of the shipper, or to enable him to avoid a risk and put the same on the defendant, than justly ought to rest upon himself. If the law were otherwise, the shipper of money, or other things of great value and hazardous in their keeping, might subject the defendant to a risk for hours—in some cases, for a day and night, or longer, perhaps—not necessarily or properly incident to its business and duties, and which the shipper himself ought to bear. Thus, one intending to send by the next express \$100,000 in gold coin might, the evening, next before the day it would start, at 12 o'clock M., on purpose to avoid risk himself, compel the defendant to assume the risk of keeping the money during the meantime; not because such keeping was incident, or at all necessary, to its business or duties, but to disburden the shipper. It would be alike unnecessary, unreasonable, and unjust to thus burden the defendant. We cannot conceive of a reason of justice, of necessity, or policy that makes it necessary or proper to do so. The defendant was bound to receive the money tendered to its agent for transportation by the plaintiff within a reasonable time next before the departure of the next express going in the direction of the destination of the money; that is, within such time as the defendant's agent could, in the order of business, receive the money and prepare it for shipment. What such reasonable time is, cannot be determined by any uniform or precise rule. This depends upon a variety of facts

and circumstances,—the place, the volume of business done there, the articles to be shipped, and the like considerations. The time must be sufficient to receive and ship the goods by the next express, as above indicated. *McRae v. Wilmington & W. R. Co.*, 88 N. Car. 526; *Britton v. Atlanta & C. A. L. R. Co.*, *Id.* 536; 2 Redf. R. R. chap. 26, § 10 *et seq.*; 2 Pars. Cont. (5th Ed.) 174; *Lane v. Cotton*, 1 Ld. Raym. 652.

The plaintiff tendered the money early in the evening next before the day the next express was to go, at 12 o'clock and 45 minutes of that day; and he insists that he had the right then to present and have it received, and, as the agent refused to receive it then, the defendant at once became liable for the penalty prescribed and given by the statute, (Code, § 1964,) and sued for in this action. The question whether this contention is well founded or not must be determined by a proper interpretation of the statute just cited. It prescribes that "agents or other officers of railroads and other transportation companies whose duties it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf, or boat-landing, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall be liable to a penalty of fifty dollars; and each article refused shall constitute a separate offense." It is conceded that the material words, "whenever tendered," used, are not to be taken literally. To so treat them would lead to practical and ridiculous absurdity. As employed, they do not imply at any and all times,—when the agent is taking his meals, while he may be reposing, at night, at midnight or daybreak, or at sunrise, or on Sunday. These words must receive a reasonable and just interpretation, in the light of the business to which the statute applies, and which it is intended in some measure to regulate. Thus interpreted, we think they fairly imply whenever the freight shall be tendered to the agent or officer of the company in the regular, orderly course of business, when the articles to be shipped ought to be received for that purpose; that is, within the time it is the duty of the carrier, having in view its nature and purpose, to receive the freight tendered. These words do not imply that the carrier shall receive the freight so tendered, and keep it in a warehouse for an indefinite and unnecessary length of time before, in the order of business, it can be shipped on the way to its destination. It is not the business of such companies, as common carriers, to thus store and keep freight. It is their business and purpose

Interpreta-
tion of statu-
te.

to transport it promptly; and the purpose of the statute is to compel them to do this by imposing penalties in case they fail to do so. It was not the purpose of the legislature to enlarge the scope of the duties and purposes of such companies. There is nothing in the statute that so provides in terms, or by just implication. The simple purpose was to compel them to a prompt and faithful discharge of their common-law duties. This court has so repeatedly declared. *Branch v. Wilmington & W. R. Co.*, 77 N. C. 347; *Whitehead v. Wilmington & W. R. Co.*, 87 N. C. 255, 9 Am. & Eng. R. Cas. 168. In this view the words "whenever tendered" must mean "whenever tendered" as I have pointed out above. This seems to me to be the only reasonable meaning of the words as employed. Any other interpretation of them would leave their meaning so loose and indefinite as to render their application impracticable.

Other words of the statute, as well as its spirit, strengthen the view I have thus expressed. The statute applies to companies "whose duties," not simply in the sense of business, are to receive freights; to receive them, in the order of business, when they must be received to be promptly shipped on the way. Such freights must be "tendered at a regular depot, station," etc.; the shipper "tendering the freights under existing laws," not simply under statutory regulation, but, as well, under general principles of law applicable, such as that which requires that freights shall be received only within a reasonable time next before they are to be sent on the way to their destination. The interpretation I have given these words, harmonizes, too, with the other statutory provision (Code, § 1963) prescribing rules of transportation for railroad companies, wherein it is provided that such companies "shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered at the place of starting," etc. This provision is simply in affirmance of a general principle applicable, and it indicates the spirit and purpose of sundry statutory regulations that apply to railroad companies, and other companies that are common carriers, including that under consideration.

It is said that this interpretation of the statute would not accommodate the convenience of persons who might occasionally go a considerable distance to ship money, or other like things. This objection is without force. It was not the duty of common carriers to provide for such exceptional cases; and, as we have seen, the statute does not enlarge the scope of this duty. Its purpose is to compel a due discharge of the same. All shippers are placed on the same and equal footing;

and it is their duty to learn and observe the orderly course of business. It is their own neglect if they will not. In the absence of any particular regulation as to the time freights should be tendered, the law provides that it shall be done within such reasonable time as will enable the carrier to ship the goods on the way by the next express after the tender. The precise rule and practice of the defendant to be observed in receiving freights for shipment does not appear; but it does appear affirmatively that the plaintiff did not tender the money to be shipped to the agent within a reasonable time next before the departure of the next express going in the direction of the destination of the money. It was tendered 15 or 20 hours or more before the next departure,—a night intervening. The agent expressly notified the plaintiff of the rule, and that he would receive the money if tendered the next morning. The defendant had the right to decline to receive it until the next day, in the forenoon. It was not bound to receive and keep it for the plaintiff during the night. If it had been received the next morning, ample time—several hours—would have been afforded to prepare it in all respects for shipment by the next express.

Carriage of Goods—Hours During Which Tender of Freight May Be Made.

—A railway company has no right to close its offices, and refuse to receive goods which are tendered to it with the proper amount for carriage, while at the same time they continue to receive goods, prepared, assorted and packed in the same manner, from a particular individual. *Garton v. Bristol & E. R. Co.*, 1 B & S. 112.

A railway company published a printed notice, which was fixed over the door of the station for the reception of goods in Liverpool, that all goods received after 4 o'clock P. M. would be forwarded on the next working day. Long after the publication of this notice goods were brought to the station, about half-past 5 P. M., to be forwarded to Birmingham by the railway. The person who brought them (a servant of the owner) saw the company's weigher, and asked if there was time, *i. e.*, for the goods to proceed that evening; he said there was, and the goods were placed by the company's porters, on the tracks on which goods are carried upon the railway. The same person had on former occasions taken goods of the same kind to the station at a later hour, which were never refused for being too late, and which had been forwarded the same evening. *Held*, that there was evidence to go to the jury of a special contract by the company to forward the goods on the same evening on which they were delivered. *Pickford v. Grand Junction R. Co.*, 12 M. & W. 766.

A railway company fixed as a limit for receiving parcels to be forwarded the same night the hour of 6.30 P. M., but after that time, their own wagons, which had been delayed in reaching the station, or in which the goods had been previously sorted and were ready for transmission. A carrier forwarding goods by the railway having applied for an injunction to restrain the company from giving undue preference to themselves, *held*, by ERLE, C. J., and SMITH, J., that an injunction ought not to issue; by WILLES and KEATING, JJ., that it ought. *Palmer v. London & S. W. R. Co.*, L. R. 1 C. P. 588.

A. collected parcels and forwarded them by railway; the railway company refused to admit A.'s vans into their station after 6:30 P. M., but admitted their own vans and those of B. at a later hour with parcels, which they forwarded the same night. The time (6:30 P. M.) fixed by the company as that after which they would not receive goods to be forwarded the same night, was reasonable. The company in admitting their own vans later acted *bona fide*, and not with the intention of gaining an undue advantage over other collecting carriers; they admitted B.'s vans in consequence of an injunction obtained by him. In two similar cases—*Garton v. Bristol & E. R. Co.* 1 B. & S. 112, and *Baxendale v. South Western R. Co.* 12 C. B. (N. S.) 758—injunctions under the Railway & Canal Traffic Act, 1854 (17 & 18 Vict. chap. 31), § 3, had been granted by this Court to restrain those companies from admitting their own vans into their station with goods to be dispatched the same night at a later hour than those of other persons. On an application of A. for a similar injunction against the present defendant, *held*, (by ERLE, C. J., and MONTAGUE SMITH, J.) that the exercise of this special jurisdiction by the Court being subject to no review, and depending in each instance on the special facts of the case, cases previously decided under it are not binding on the Court in the same manner that precedents in law are binding; that the injunction prayed would interfere with the transportation of traffic, which it was the object of the legislature to facilitate; and that it ought not to be granted. *Held* (by WILLES and KEATING, JJ.), that the above cases were precedents binding on the Court, and also were rightly decided: and that the injunction ought to be granted. *Palmer v. London & S. W. R. Co.*, L. R. 1. C. P. 588.

Refusal to Accept Freight on Account of Press of Business.—See *Houston & T. C. R. Co. v. Smith*, (Tex.) 22 Am. & Eng. R. Cas. 421.

LAND

v.

WILMINGTON & WELDON R. CO.

(*North Carolina Supreme Court, October 14, 1889.*)

Carriers of Goods—Tender of Freight—Regular Depot or Station.—A regular depot or station "as contemplated by a statute requiring railroad companies to receive freight tendered, and imposing a penalty for refusing to do so, is a certain place situated alongside of, or near to a railroad, fitted up by it with suitable buildings, erections, appliances and conveniences for carrying on generally and continuously in an orderly manner, the business of transporting freight, and the facts that a mail train stopped regularly at a certain place to deliver mail and that the place was set down in circulars and orders of the company as a station, do not necessarily make such place a regular station.

APPEAL from Superior Court, Halifax County.

R. O Burton, Jr. for appellant.

W. H. Day and J. M. Mullen for appellee.

MERRIMON J.—This action is brought to recover divers penalties, which the plaintiff alleged the defendant railroad company incurred by the refusal of its agent to receive certain car-loads of lumber at one of its regular stations on its road, called "Spring Hill," for transportation, etc., in violation of the statute. Code, § 1964. On the trial, the court, among numerous issues, submitted one in these words: "Was Spring Hill a regular depot of defendant on its branch road from Halifax to Scotland Neck from the 29th of October to the 5th of November, 1888, inclusive?" Case stated.

The substance of the evidence produced on the trial bearing upon this issue was as follows: The plaintiff introduced J. H. Darden as a witness, who among other things testified as follows: "When the train is running from Halifax to Scotland Neck, after leaving Tillery, it stops every day at Spring Hill. On some occasions it stops at Tillery's Turnout, a mile this side of Spring Hill. On return from Scotland Neck it always stops at Spring Hill. The announcement, 'Spring Hill' is made on the train going and coming. It is now a prepay station. Some time ago they had an agent there, and it was a regular station. Plaintiff has had a saw-mill at Spring Hill since May, 1887. Defendant has been taking his lumber all to the train at Spring Hill Turnout station. They had an agent,—J. F. Brinkley. None that I am aware of since he left. This paper [local freight tariff No. 2] was pasted up in the depot at Spring Hill: that is, in the railroad office where the agent was when Mr. Brinkley was agent, where the railroad business was transacted. There is a half-dozen in there now." Facts.

The plaintiff then introduced in evidence said tariff No. 2. Witness: "On 30th October, 1888, I tendered two cars of lumber for shipment to Taliaferro & Co., Richmond, to Capt. Hassardshort, the conductor on the Scotland Neck Branch of the Wilmington & Weldon Railroad Company, at Spring Hill. Destination, one to Richmond, one to Elba station. The cars I tendered were on side track at Spring Hill, loaded and ready for transportation. Capt. Hassardshort didn't receive them. They had been in the habit of taking plaintiff's lumber at Spring Hill. Never anywhere else. Been in the habit of tendering it to the conductor. The paper was in S. P. Brinkley & Son's office, where they kept railroad office. I took it down to use here. Don't know,—can't speak posi-

tively whether there has been railroad office there for several months past. Mr. Brinkley was the agent there, and resigned. Don't know exact date. I seldom travel over the railroad. Don't know that all the lumber shipped at Spring Hill is billed from Tillery. The room where I got the paper I don't suppose is the railroad office now. It was not in October, 1888. There was no agent there. The old books are there now, and notices are up on the wall now. I took it down to refresh your memory, and that of all persons interested. It is a prepay station now. It was a regular station some time ago. When we were shipping from there, when Mr. Brinkley was there, we did not prepay, and did not afterwards. When Mr. Brinkley was there, and it was a regular station, and goods were shipped to a party, Brinkley collected freight there. Since then it is customary in ordering goods to prepay freight."

Defendant introduced A. S. Hassardshort, who testified, among other things as follows: "Am conductor on Scotland Neck branch W. & W. R. R. Co., and was from 29th October, to and including 5th November, 1888. No tickets were sold at Spring Hill: no agent, no warehouse, nor telegraph office. I think Mr. Brinkley resigned in December, 1886, and there had been no agent there for about two years. I remember Darden offering me cars at the time of the block in Richmond. They gave me bill there, and I take it to nearest station and have it billed by agent. It is billed not at Spring Hill, but at Tillery. I believe that is the only way I ever received it at Spring Hill. The agent bills it at Tillery." Cross-examined: "Have not my tariff rates here. Have book for train as to passengers. It is put down what I charge passengers to Spring Hill,—60 and 50 cents; to Scotland Neck, 75 and 60 cents. Carry prepaid freight to Spring Hill. If not prepaid carry it to Scotland Neck. We take cotton and give bill lading for it on road, just as I do at Walter Shields' farm, where they often have cotton to ship."

J. R. Kenly, assistant general manager and superintendent of transportation of defendant, testified for defendant: "We do not consider Spring Hill a regular station, because it is not equipped as regular stations are. A regular station is one at which an agent is stationed for transaction of the company's business, and at which shelter is provided for freights; in other words, a point at which we are able to receive, protect, and deliver freights in our prescribed form. All freights shipped to an irregular station are required to be prepaid. At regular stations freight is collected at point of delivery. Between 29th October and 6th November, 1888, inclusive, Spring Hill was not a regular station. I think it ceased to

be a regular station 1st January, 1887. It is now an irregular station." "We have a policy in regard to irregular stations. We are frequently petitioned for flag-stations. They usually offer the ground for station, and to furnish agent. Our invariable answer is, 'We do not consider business sufficient to justify expense of agent, but for convenience of people we will permit trains to stop, with the understanding that the petitioners are to be responsible for any irregularity that may arise in delivery of freights at that point.' We have no warehouse or agent at Spring Hill." Cross-examined: "There is a platform there. Don't know whether there ever has been a warehouse there. Have been in my position since 1885. I said a regular station was one equipped with an agent and building for freights. A flag-station is a very different one from an irregular station, though it may be one. We have lots of irregular stations that are flag-stations. On main line few fast trains stop at all points, but will stop on signal, and it is noted on our tables by a dagger that train will stop on signal. An irregular station is always a flag-station. A regular station is sometimes a flag-station. I have not with me a table of stations and tariffs. [Local freight tariff No. 2 shown witness.] This is one of our tariffs. The title places on margin are stations. Wherever there was a star there was no agent. It seems by this that in 1886 Spring Hill had an agent. [Circular No. 2095 shown witness.] This is one of the company's circulars. The places on it are names of stations." Redirect: "No. 2095 is a tariff of out-going freights, going north to Richmond. If it was going south it would designate the prepay stations. That is my impression. I am not a freight agent."

Hassardshort recalled by defendant. "Always stop at Spring Hill to deliver mail. Wouldn't always stop but for that. When Spring Hill was regular station, Brinkley was agent, and cared for freight at his house."

His honor instructed the jury that, upon the evidence, the place called "Spring Hill" was not a regular station or depot, as contemplated by the statute, and therefore that their response to the first issue should be "No," and that it would not be necessary for them to consider the other issues, except the fourth. Hereupon the plaintiff excepted. The jury rendered a verdict in obedience to the directions of the court, as to first issue "No." The plaintiff put in evidence "No. 2, Local Freight Tariff, in effect October 1st, 1886," in which Spring Hill is mentioned with other stations, without any particular designation; and also a "Circular, No. 2095," of defendant, as to "Rates on Lumber to Richmond," in which Spring Hill is simply mentioned with other stations. The

court gave judgment, and the plaintiff, having assigned error, appealed to this court.

The Code (section 1964) prescribes that "agents or other officers of railroads and other transportation companies, whose duties it is to receive freight, shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf, or boat-landing, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall be liable to a penalty of fifty dollars, and each article refused shall constitute a separate offense." It will be observed that such tender must be made "at a regular depot or station," etc.

The word "regular," as thus employed, is important and significant. It is descriptive and limiting in its meaning and application. It implies, in the order of the business of such companies, a settled, established, recognized depot or station, and such tender of freight there, as contradistinguished from an irregular, temporary, or casual place fitted up in some limited degree for the purpose of receiving freight for shipment for the convenience or accommodation of the shipper or the company, or for the same of both. Such temporary places are not adapted to and fitted up for, nor are they intended to be used in, the ordinary, orderly, and continuous course of business. A great variety of circumstances and considerations might prompt a railroad company to depart from the regular course of business, especially when its road is new, in receiving various kinds of freight at places other than its regular depots and stations. It might be convenient, indeed, important, to its business, to receive such freight as lumber, heavy timber, stone, brick, cotton, corn, or other ponderous freights, at irregular, temporary stations along the way, to be used for an occasion, for a week or a month, or at intervals, as occasion might require. It might do so, not regularly, not for shippers generally, but for special considerations of convenience or profit, when it could or would, in its discretion; and it might provide side tracks and other appliances for such temporary purposes. The statute, clearly, does not apply to and embrace such depots and stations. The word "regular," as employed, is intended to exclude such implication. If the purpose had been to include them, the appropriate language would be, "tendered at any and every depot, station," etc., or other like comprehensive terms. The purpose not to include such irregular stations is the more manifest because it would be im-

Provisions of statute.

"Regular depot or station."

practicable, unreasonable, and unjust to require such companies to receive freight at places where it had not made preparation for the general reception of the same. It is not to be presumed, in the absence of statutory provision, that the legislature intended to prevent them from receiving freight on the way now and then, more or less frequently, as their and the shipper's convenience might prompt. There is nothing in the general statute, of which the section under consideration is a part, that suggest such purpose. A regular depot or station of a railroad company, as contemplated by the statute, is a certain place situate along-side of or near to its railroad, fitted up by it with suitable buildings, erections, appliances, and conveniences for carrying on generally and continuously, in an orderly manner, the business of transporting freight, as is usually done by such companies. Such buildings and other things necessary for a regular depot or station may be greater or smaller in number and extent, or more or less elaborate than others of like kind, and for like purposes; but whether they be sufficient or good or indifferent, they are well or ill adapted to and intended for the purpose of prosecuting the business of transporting freight and passengers, and of receiving from shippers generally, and at all seasonable times, such freight as the railroad company is required to transport over its road. Such depots or stations imply, ordinarily, such suitable and sufficient buildings, erections, and appliances as may be necessary in receiving and delivering freight, and for the temporary protection of the same until they shall be transported or delivered to the persons entitled to have them, and that the company has a business office there, and suitable agents and employes to receive and deliver freight, to give receipts, bills of lading for the same, and to do the like and similar service. They are settled, recognized places to which shippers of freight may at all appropriate times go to ship or receive freight. The law so requires, and such companies hold themselves out at such places to the public as there ready and prepared to receive freight, and do what should be done in respect to and about the same. It is at such places shippers have the right, under the statute, to tender freight to the agents of such companies for transportation, and not elsewhere. *Kellogg v. Suffolk & C. R. Co.*, 100 N. Car. 158, 35 Am. & Eng. R. Cas. 529; *Chicago & A. R. Co. v. Flag*, 43 Ill. 364; *State v. Northampton Co.*, 41 Conn. 134.

Now, applying what we have thus said to the case before us, we think the court below properly instructed the jury, in substance, that the whole evidence produced on the trial, accepted as true, did not prove that the plaintiff tendered the

freight, as alleged in the complaint, to the agent of the defendant at a regular depot or station on its road. It seems that at one time, a considerable period before the tender of the lumber by the plaintiff, the defendant kept an office, a place of business, at the place designated as "Spring Hill," but the witness for the plaintiff does not say that a regular depot or station was there. On the contrary, his evidence tended to show that the defendant had received the plaintiff's lumber (not that of others) there irregularly from time to time for a considerable while. The facts that the place was called "Spring Hill," that the mail train stopped there regularly to deliver the mail, that the place was set down in circulars and orders of the company as a station, did not necessarily make it a regular station. Regular, orderly business must have been done there. The defendant must have professed to do such business there, had suitable buildings and appliances, agents and employes, there to give bills of lading, receipts, and the like to shippers going there to tender or receive freight at all appropriate times. There was no depot, no freight, no agent, no employe stationed there for such purposes at the time of the alleged tender, or for a long while before that time, and this, we think, fairly appears from the evidence taken as true. If the plaintiff intended to insist upon his right to compel the agent of the defendant to accept the freight, or subject the defendant to the penalty for his refusal to do so, then he should have tendered it at a regular station. He can have such penalty only in the case prescribed by the statute. It imposes the penalty only when the tender and refusal were made at a regular station, such as that pointed out above. Judgment affirmed.

Tender of Freight must be at regular depot or other usual or designated place for receiving freight. *Louisville, N. A. & C. R. Co. v. Flanagan* (Ind.), 32 Am. & Eng. R. Cas. 532.

What is a Regular Depot or Station within the meaning of the North Carolina statute, see *Kellogg v. Suffolk & C. R. Co.* (N. Car.), 35 Am. & Eng. R. Cas. 529.

WILSON

v.

ATLANTA & CHARLOTTE AIR LINE R. CO.

(Georgia Supreme Court, July 31, 1889.)

Carriage of Goods—Delivery to Carrier—Essentials.—Delivery of goods to a common carrier for transportation, whether actual or constructive being a bailment, involves exclusive possession in a carrier, and this involves a surrender of custody and control for the time being by the consignor.

Same—Delivery of Cordwood Along Line of Railroad.—In an action to recover damages for delay in transporting cordwood which was piled along the line of the railroad company at various places over a distance of two miles, the plaintiff cannot recover if the deposit along the line was made for the convenience of the owner in delivering it at some future time, and if the carrier did not assume possession and custody to the exclusion of the owner, there being otherwise no acceptance for shipment by the carrier.

Instructions—Questions Involved in Case.—When the charge of the court affirms as a fact that there was no contention of the kind stated, this means that there was no such contention at the trial, and the statement will be taken in the supreme court as true, unless the contrary be certified in the bill of the exceptions, or elsewhere in the record.

Same—Measure of Damages—Harmless Error.—When the measure of damages given by the court to the jury is more favorable to the plaintiff than the one prescribed by law, the plaintiff has no cause to be dissatisfied therewith.

ERROR from City Court of Atlanta.

Frank A. Arnold for plaintiff in error.

John L. Hopkins & Son for defendant in error.

BLECKLEY, C. J.—In the fall of 1880, certain persons had about 1,200 cords of wood piled along the line of this railway company, between the eighth and tenth mile-posts from Atlanta. The plaintiff, Wilson, desir- Facts. ing to purchase the same if he could have it transported by the company to Atlanta, consulted with the master of trains, and ascertained from him that the company contemplated clearing the road in a short time of all the wood along the line; that a train would be put on for that purpose, etc. Wilson, acting upon this information and assurance, made the purchase. At that time it was the custom of the company to supply cars upon application, when it could do so, and for the owners of wood to employ hands and load the same. Sometimes, upon special request, the company would em-

ploy the hands and charge extra on that account, but it was not the custom to do this without special request. As to about 300 cords of the wood purchased by the plaintiff, there is no complaint of delay in the transportation. About 200 cords have never been carried to Atlanta at all, or the residue, after long delay, was carried and delivered during the year 1881 and the spring of 1882. The present action was brought for damages resulting from this delay, and from the loss of 158 cords not carried and delivered at all. The declaration alleges, in substance, that, relying upon the custom of the defendant, and the assurance of its officer, the plaintiff bought the wood, and delivered it to the defendant, and offered it for shipment on the line of the road between the eighth and tenth mile-posts, and the defendant undertook and promised to haul it to Atlanta promptly, and made no objection to the time, place, or manner of delivery for shipment; and as to 158 cords there was no carriage and delivery at Atlanta, but the same was wholly lost to the plaintiff, and converted by the defendant to its own use; and as to 866 cords there was unreasonable delay in carrying and delivering, to the plaintiff's damage, etc. The declaration alleged nothing of any application for cars, or of any offer by the plaintiff to furnish hands to load them, or of any request made of the company to furnish such hands; nor was there any allegation of refusal by the company to receive any wood offered it for transportation, or to furnish cars in which to load it for shipment. The evidence showed that frequent applications had been made for cars, and that the company failed to furnish them, giving as a reason that the company did not have them to spare. On one or more occasions, when the plaintiff suggested that he could obtain cars elsewhere, the officer answered that he did not have a locomotive to spare. The value of the wood at the point of shipment was proved, and also the value in Atlanta in the winter of 1880, in the year 1881, and in the spring of 1882. There was other evidence, but the foregoing facts, though a very meager synopsis, will serve for an understanding of the rulings made in this opinion. Nothing was proved as to tender or payment of freight, or as to the time and place at which, according to custom, the freight was payable. The jury found for the defendant, and a motion was made for a new trial, on the general grounds, and on certain charges of the court and refusals to charge as requested.

1. The great and controlling question in the case was as to whether the wood was delivered to the company, and accepted by it for shipment. The court charged the jury, in substance, that delivery is complete when, actually or in legal effect,

the possession is surrendered to the carrier, and the owner abandons all control over the goods until the carriage is completed, and that not until this has been done does the responsibility of the carrier commence either for loss or detention. Also, that if deposit along the line was made for the convenience of the owner in delivering at some future time, and if the carrier did not assume possession and custody to the exclusion of the owner, the wood was not accepted for shipment, and the carrier's responsibility would not begin until something more was done to accomplish the bailment. Also, that if plaintiff's vendors deposited the wood in this way, and continued to exercise acts inconsistent with its exclusive possession and custody by the company as a common carrier, the bailment would not begin until there was a complete surrender by the plaintiff to the carrier for shipment. Under the facts in evidence, and according to the authorities, these instructions were correct. *Hutch. Carr.* §§ 82-99, inclusive; 2 *Ror. R. R.* 1279 *et seq.* We think it clearly appears that under the system which both parties had in contemplation it was expected that before delivery was consummated, the owner would either load the cars himself, or have it done by the company at his expense, after special request. Delivery on board the cars, according to that system, would terminate the plaintiff's possession, and be the inception of possession by the carrier. *Wells v. Wilmington & W. R. Co.*, 6 Jones (N. C.), 47. Should it be thought that *Railroad Co. v. Hines*, 19 Ga. 208, or *Fleming v. Hammond*, *Id.* 145, militates with this view, the circumstances of difference is that in these cases the shipper had done all that the prevailing system required of him. He neither had to supply labor for altering the situation of the goods, nor to make any special request that the carrier would supply it at his expense. Moreover, there is a high degree of improbability that a railroad company or its patrons would ever consider that wood which was scattered along several miles of the line of railway, awaiting future transportation, was in the possession of the company as a common carrier. If in the company's possession, it would be at the company's risk, and loss of the same by fire, theft, etc., would be chargeable to the company. Perhaps it might be reasonable, in the absence of custom to the contrary, to consider the wood as delivered in this way if immediate transportation of the whole was expected; but in this case it was unknown to any of the parties when the company would be ready to effect the transportation. No definite time was ever fixed, and according to the evidence several trains of cars would be required to move such a quantity of wood, a train-load being about 100 cords.

Delivery of
goods to car-
rier.

The plaintiff, under the evidence, might have had a cause of action against the company for not receiving the wood, or for not furnishing cars in which to load it for delivery to the company, but this action has no such scope.

2. The court charged: "There is no contention in this case that the defendant was bound by any custom to accept delivery of wood delivered along its route between stations, and forward the same in due course as in case of goods actually received and receipted for transmission to its regular depot or station." This is complained of. The court, we take it, meant that there was no such contention at the trial, and, if this was true, it was the right of the court to state it to the jury. We are now here certified that it was not true. *Brantly v. Huff*, 62 Ga. 532 (7). Besides, correctly understood, this instruction means simply, as we conjecture, that the plaintiff relied on a constructive, rather than an actual, delivery to the company, and in truth the latter species of delivery is all of which the evidence affords any glimpse.

3. Passing over the fifth ground of the motion, which we do not understand, the next topic of the charge is as to damages, touching which, with reference to the wood wholly lost, the court indicated as the measure of damages the value at the place of destination, and at the time when delivery ought to have been made, less the freight; and, as to the wood delayed but finally delivered, the difference between the value at the point of shipment and the point of destination after the lapse of a reasonable time for effecting the carriage, less the freight. The first measure was undoubtedly correct, and the second was incorrect only in that it was more favorable to the plaintiff than the measure prescribed by law. As at any and all times the wood was worth more at Atlanta than at the point of shipment, the difference between the two values at Atlanta would be less than the difference between the higher of these and the value at the point of shipment. It is plain that of any three values the difference between the highest and the lowest is more than the difference between the highest and the one immediately below it. As to deducting freight, this would have been wrong if the freight had been paid, as to which there was no evidence.

4. The request to charge that if the wood was delivered to the company the company would be estopped to deny that there was custom to ship it, was not applicable, because the whole pressure was upon the question of delivery, and, if there was delivery, whether there was a custom to ship or not would be immaterial. The request to charge that the company would be

Obligation of
carrier to ac-
cept delivery.

Measure of
damages.

Estoppel to
deny ship-
ment.

bound to ship the wood in its turn did not state the law correctly. The plaintiff would have no right of action if the wood was shipped in a reasonable time, whether in its turn or not. The request to charge the general proposition that the railroad was a common carrier, bound to act with fairness, etc., was a barren generality, and therefore not needed for the case. The request to charge that the defendant was bound to furnish sufficient rolling stock to haul the ordinary business offered it, would have been appropriate had the action been for refusing to receive, and not for failure to carry after receiving. The general grounds that the verdict was contrary to law, evidence, etc., were correctly overruled with the rest, and there was no error in refusing a new trial. Judgment affirmed.

Delivery of Goods to Carrier.—See *Louisville, N. A. & C. R. Co. (Ind.)*, 32 Am. & Eng. R. Cas. 532.

CRUTCHER

v.

COMMONWEALTH.

(Kentucky Court of Appeals, June 15, 1889.)

Interstate Commerce—License tax on Agencies of Foreign Express Companies.—A statute regulating the agencies of foreign express companies which imposes upon the agents of such express companies a fee of \$5 does not interfere with interstate commerce, and is not invalid.

APPEAL from Circuit Court, Franklin County.

Indictment against O. R. Crutcher for unlawfully carrying on the business of agent of a foreign express company without obtaining a license. The jury returned a verdict convicting the defendant, and he appealed.

Harmon, Colston, Goldsmith & Hoadley and *Ira Julian* for appellant.

Jas. P. Helm for the Commonwealth.

PRYOR, J.—It seems to us that the case of *Woodward v.*

Com. (Ky.), 35 Am. & Eng. R. Cas. 498, in which the statute appears in full (decided by this court at its last term), determines the question now presented. Counsel for the appellant now claims that the statute of this state is invalid, as its effect is to regulate commerce among the several states.

The agent of the express company was fined for not paying to the auditor a fee of five dollars, or, rather, for failing to take out a license required by the act regulating the agencies of foreign express companies, passed in March, 1860, and amended by the act of 1866. That the company of which the appellant is agent is a corporation created by the laws of New York, doing business in this state as a carrier of goods, wares, and merchandise, is conceded; and that it transports goods, etc., out of the state into other states, and all other species of property usually incident to such transportation, is admitted. It appears that at least 50 per cent. of the business done by this agent consists in the carrying of goods from the place of his agency (Frankfort) to other states. That the carrying and transportation of goods from one state to another is a branch of interstate commerce is not controverted, but it is claimed that there is nothing in the legislation imposing on those who desire to act as the agents of this foreign corporation the burden of paying to the auditor the fee of five dollars for recording his agency, or, rather, for issuing him his license to act as such.

The statute was enacted for the benefit of the citizens of the state under which the auditor is required to have satisfactory evidence of the ability and solvency of the corporation to do that which it has undertaken to do by virtue of its act of incorporation. Those who intrust to its custody the transportation of their property, are entitled to some security that its undertaking will be performed, and we find no law of congress, or any constitutional provision, that would deny to the state the right to impose such a burden upon those who undertake the discharge of such responsible duties. There is no discrimination made between corporations doing a like business; and the state, although the appellant's company is a foreign corporation, has the right to license the business and calling of this agent as it would that of the lawyer or merchant whose business is confined to the state alone.

In the case of *Smith v. Alabama*, 124 U. S. 465, 33 Am. & Eng. R. Cas. 425, where the train of cars or the main line of road extended from the one state into the other, and passengers and freight are constantly transported over the entire line, the supreme court held that a statute of Alabama re-

Regulation of
interstate
commerce.

quiring the locomotive engineers to be examined and licensed by a board appointed for that purpose before attempting a discharge of their duties was constitutional, and no impediment to the free transaction of commerce among the states. See, also, *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 38 Am. & Eng. R. Cas. 1. We cannot perceive how any burden has been placed by the state upon the interstate commerce by the provisions of the enactment in question, and must therefore affirm the judgment.

License Tax upon Agencies of Foreign Corporations.—See *Woodward v. Com. (Ky.)*, 35 Am. & Eng. R. Cas. 498; *Norfolk & W. R. Co. v. Com. (Pa.)*, 26 *Id.* 48.

License Tax upon Express Companies.—See *Memphis & L. R. R. Co. v. Tennessee (Tenn.)*, 13 *Id.* 423.

STATE

v.

CREEDEN *et al.*

(*Iowa Supreme Court, October 18, 1889.*)

Interstate Commerce—Seizure of Liquors Stored in Warehouse.—Where six successive shipments of liquor were held by a railroad company from six to fifteen days after the termination of the transit from a point outside of the state, *held*, that the delay was of such a nature as to terminate the duties of the carrier and to render the railroad company only liable for the goods as a warehouseman, and that being no longer in transit, they could be seized under the state laws prohibiting the illegal keeping and sale of liquors without violating the provision of the federal constitution, vesting the control of interstate commerce in congress.

Same—Collusive Agreement in Evasion of Law.—Where by arrangement with the consignee of different shipments of liquor, the railroad company retains the goods until called for, and does not until that time collect the freight charges thereon, which only amount to a few cents on each shipment, the evidence tends to prove an agreement with the consignee to evade the law, and the company cannot resist the seizure of the liquor on the ground that its freight charges have not been paid.

APPEAL from District Court, Polk County.

Information against Con Creeden and the Chicago, Rock Island & Pacific R. Co., alleging that intoxicating liquors belonging to the defendant Creeden were kept in a freight de-

pot of the defendant company, and were intended for sale in violation of the statutes relative to the sale of liquors. Six separate packages of liquors having been seized under a search warrant, the liquor was condemned. The railroad company having appealed to the district court, judgment ordering the condemnation and destruction of the liquor was rendered, and it now brings the present appeal.

*Thos. S. Wright and George E. McCaughan for appellant.
J. A. Harvey and J. Y. Stone, Atty. Gen., for the State.*

BECK, J.—1. The facts established by the undoubted preponderance of the evidence are these: There was shipped from Rock Island, Ill., by the Chicago, Rock Island and Pacific Railroad Company, consigned to defendant Con Creeden, at Des Moines, six packages of whisky, in separate shipments. The packages contained about five gallons each. Two were shipped on the 7th, and one each on the 9th, 14th, 15th, and 17th days of November. Each package was received at the railroad freight depot at Des Moines in two days after the date of its shipment. The charge on each package was 34 cents. They were kept in the freight-house or warehouse of the company until taken upon the search-warrant issued in this case. The defendant Con Creeden had received like packages of intoxicating liquor prior to this from the railroad company, which had been, in the same way, shipped to him from places out of the state. The liquors were seized on the 23d day of November. Two of the packages had been for 15 days in the railroad freight-house at Des Moines, one for 13 days, one for 9 days, one for 8 days, and one for 6 days. Con Creeden kept a place in Des Moines for the unlawful sale of intoxicating liquor, and was guilty of frequent violation of the law against their sale. The packages were marked with the word "whisky," and prior to the seizure in this case like packages had been received for and delivered to Con Creeden, one at a time, by the railroad company.

2. In *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 23 Am. & Eng. Corp. Cas. 236, the United States supreme court has held that the laws of this state restricting the transportation of intoxicating liquors from other states into this state are a regulation of commerce, and is therefore in conflict with the constitution of the United States, which it is held secures the right of transportation of articles of commerce from one state to another. The features of the Iowa statute held to conflict with the United States constitution are those which restrict the right of common carriers to transport intoxicating liquors

*Bowman v.
Chicago & N.
W. R. Co.*

into this state. The restriction upon the powers and rights of carriers is the point upon which it conflicts with the constitution of the United States. In so far as the statute prohibits the keeper, of saloons, restaurants, warehouses, or any other place, from keeping intoxicating liquors for unlawful sales, it does not conflict with the constitution of the United States. But, as commerce is dependent upon carriers for transportation of all articles of trade, their powers and rights cannot be restricted. We think there can be no doubt that this is the correct purport of this decision.

We do not understand that the United States supreme court has decided in this case, or in any other, that intoxicating liquors transported from another state may be sold within this state for uses forbidden by its laws. Power of state to prohibit sale of liquors. Indeed, the court expressly declares that the question is not in the case. The United States supreme court in many decisions has held that the states have the constitutional right to forbid the sale of intoxicating liquors within their borders. It appears that this controlling thought has escaped attention in the discussions upon the subject of the effect of the constitutional authority of congress to regulate commerce between the states upon the power of a state to forbid the sale of intoxicating liquors within its borders which are imported from another state. Commerce is not the use of articles of traffic. When the United States constitution conferred upon congress the power to regulate commerce between the states, it was not intended that provisions should be made by congress to affect the use of the subjects of commerce. It surely was not the intention that laws should be enacted affecting the tastes, habits, and wants of the people, so as to increase the demands for articles of traffic; nor could it have been intended that the governments of the states established by the people should be deprived of the power to repress the use of such articles of commerce as the state determines are detrimental to the morals, health, peace, and prosperity of the people. The people, by their tastes, habits, wants, and laws enacted by themselves, determine what articles of commerce they will use. Commerce in the articles of traffic thus required by the people is regulated by congress. If the use of certain articles of commerce, as intoxicating liquors, is forbidden by the tastes, habits, and laws of the people, it is not for the courts, by judicial interpretation of the constitution of the United States, to force them upon the people against their wishes, and against the laws of their own enactment. The people of the state, in their sovereign capacity, as rulers of their own domestic affairs, may declare that intoxicating liquors shall

not be sold in the state for use as a beverage. The provision of the constitution of the United States in question cannot nullify such a state law, which is enacted in the exercise of full authority. Under it congress may regulate the traffic in such things until it comes to the point of their use as a beverage. There the authority to regulate commerce ceases to extend to the interdicted liquors, for they are no longer subjects of lawful commerce.

3. A carrier is a servant of commerce, and is protected under constitutional provisions for the regulation of commerce in the discharge of all the duties of a carrier recognized by the law. Regulations of commerce reach him while he is in the discharge of duties pertaining to commerce. When he ceases to be a carrier he is beyond the protection provided by regulations for commerce. If he ceases to be a carrier and becomes a warehouseman, he cannot be protected as a carrier.

Recurring to the facts, it will be remembered that the liquor in question had been received at the place of destination from six to fifteen days prior to the seizure, and was kept in the railroad freight-house, or warehouse used for storing freight transported or for transportation upon the railroad. It is a familiar rule of the law that upon the arrival of freight at the place of destination, and its deposit in the carrier's warehouse, his responsibility as carrier ceases. He becomes, as to the freight and the consignor and consignee, a warehouseman. *Francis v. Dubuque & S. C. R. Co.*, 25 Iowa, 60; *Mohr v. Chicago & N. W. R. Co.*, 40 Iowa, 579; 2 Amer. & Eng. Cyclop. Law, 881; Ang. Carr. (5th Ed.) § 304, and cases cited in notes. The defendant did not, therefore, hold the liquor as a carrier, but as a warehouseman. As such he was the agent of Con Creeden, the bailor.

4. But counsel for defendant say that the goods became impressed with the character of interstate commerce, and retained that character after they went into the custody of the warehouseman. In truth, commerce, so far as transportation is concerned, ceased to have connection with the liquors when they ceased to be held by the carrier for transportation. After that they were held for storage. It surely will not be contended that the storage of goods was a continuation of the transportation. They were stored because the transportation had ceased.

5. It is made plain by a consideration of the facts that the railroad company held the liquors under special arrangement with Con Creeden. Six successive shipments of liquor, each containing less than five gallons, are held for from six to fifteen days before they were seized, and it had been the prac-

Termination
of transit.

Goods in cus-
tody of ware-
houseman.

tice of the railroad company for some time before these shipments were received to hold shipments of whisky in the same way. The little freight-bills of 34 cents on each shipment were not paid until the package was delivered. Con Creeden did not present demands for the whisky, but sent an express wagon to get a jug at a time, as it was wanted for sale at the saloon in violation of law. He was a notorious saloon-keeper and violator of the law. The packages were marked "whisky." All the circumstances lead to the conclusion that the railway company held the liquor for Con Creeden under an agreement that it should aid him to evade the law. It cannot, under these circumstances, base any defense upon the fact that its freight charges were not paid. Had it dealt with Con Creeden with a purpose to obey the law, it would not have permitted its freight-bills to remain unpaid for so many days, and would not have permitted its warehouse to be used as a place where liquors kept for unlawful sale could be conveniently concealed and protected. In its attempt thus to violate the law, and to aid a notorious violator of the law to evade its provisions, it loses all claim or lien which it had, either as a carrier or warehouseman, for its freight-bills of 34 cents each upon each jug of whisky. A violator of the law will not be enabled to justify his offenses, and escape punishment therefor, on the ground of rights of property or other rights which he holds in things used in the commission of the offense. Con Creeden's right of property in the whisky cannot shield him from the effects of his unlawful acts in keeping the whisky for unlawful sale. Nor can the railroad company, which was engaged with and aided him in the violation of the law, defeat the proceeding and escape the judgment of the law, on the ground that it has a lien for trifling sums upon the liquors which it was keeping in violation of law. The foregoing discussion disposes of all questions in the case. The judgment of the district court is affirmed.

Retention of
liquors by an-
rangement
with con-
signee.

UNITED STATES, *ex rel.* MORRIS *et al.**v.*

DELAWARE, LACKAWANNA & WESTERN R. Co.

(U. S. Circuit Court, N. D., New York, October 8, 1889.)

Unjust Discrimination—Interstate Commerce Act—Transportation of Live Stock.—An application was made for a writ of *mandamus* to compel a railroad company to transport the relator's cattle in cars of a special construction belonging to a transportation company superior by reason of their improvements to ordinary cattle cars. The return of the railroad company to the alternative writ denied the charge of unjust discrimination; set forth that it had entered into a contract with another company for a term of years, by which that company agreed to furnish a certain number of its improved stock cars to run on the respondent's railroad; that such cars were not used exclusively by any one shipper of live stock, but were available to all shippers; that the cars, unlike those of the transportation company, were so constructed as to permit the carriage of coal when not loaded with live stock, and that in consideration of the special contract the respondent had agreed to use the cars upon its road and pay mileage thereupon. *Held* that *mandamus* would not be granted on the ground of unjust discrimination against the relator within the meaning of the interstate commerce act, in refusing to transport his stock in the transportation company's cars at the same rate as charged for transportation in the cars used by the company, the circumstances and conditions not being substantially similar.

Same—Mandamus—Discretion of Court.—The provision of the interstate commerce act conferring upon the court discretionary power to grant *mandamus* in a case of unjust discrimination, when any question of fact as to the proper compensation is raised by the pleading "notwithstanding such question of fact is undetermined," does not authorize the court to grant *mandamus* if no case of unjust discrimination is shown to exist.

APPLICATION for *mandamus*. On demurrer to return.

J. C. Clayton for relators.

Rogers, Locke & Milburn for respondent.

WALLACE, J.—The jurisdiction invoked by the relators is founded on that section of the "Act to regulate interstate commerce," as amended March 2, 1889, which authorizes the court to issue a writ of *mandamus* upon the relation of any person alleging the violation by a common

Case stated.

carrier of any of the provisions of the act which prevent the relator from having interstate traffic moved by the carrier "at the same rates as are charged, or upon terms or conditions as favorable as those given, by said carrier for like traffic under similar conditions to any other shipper." The unjust discrimination alleged in the petition upon which the alternative writ was granted consists in the refusal of the respondent to transport cattle for Morris, a shipper of cattle, in cars of a special construction belonging to the American Live Stock Transportation Company, superior, by reason of their improvements, to ordinary cattle-cars; whereas, it transports cattle for other shippers in cars having some, but not all, of such improvements, belonging to the Lackawanna Live Stock Express Company. The American Live Stock Transportation Company, the co-relator with Morris, is a corporation organized for the purpose of transporting live stock and other merchandise, and its presence would seem to be superfluous, unless it is here to obtain the benefit of an adjudication that the respondent is bound to accept its cars, whenever tendered with cattle for transportation, and allow to it the mileage of three-fourths of a cent per mile for the use of the cars which the relators aver is allowed by the respondent to the Lackawanna Live Stock Express Company. The return by the respondent to the alternative writ, besides denying in general terms the charge of unjust discrimination, sets forth that it has entered into a contract with the Lackawanna Live Stock Express Company for the term of five years, by which that company agrees to furnish at least 200 of its improved stock-cars to run on the railway of the respondent; that such cars are not used exclusively by any one shipper of live stock, but are available to all shippers; that the cars, unlike those of the American Live Stock Transportation Company, are so constructed as to permit of the carriage of coal, which is the principal business of the respondent, when not loaded with live stock; and that in consideration of the special contract the defendant agreed to use the cars upon its road, and pay mileage therefor, as if such cars were furnished by a connecting company; and it also alleges that, after entering into such agreement, the respondent and several other trunk line railroad companies entered into an agreement to discontinue hauling private stock-cars, except for horses, for reasons which are particularly set forth. The relators have demurred to this return, and move for a peremptory *mandamus*, insisting that the return does not allege facts which justify the refusal of the respondent to transport the cattle of Morris in the cars of the American Live Stock Transportation Company.

The jurisdiction of this court, conferred by the interstate

commerce act, to compel by *mandamus* the observance by common carriers of the provisions of the act, is restricted exclusively to the prevention of unjust discrimination by such carriers. The question for consideration consequently is whether, if the facts alleged in the return are true, the respondent has been guilty of any unjust discrimination between Morris and the shippers for whom it carries cattle in the cars of the Lackawanna Live Stock Express Company. Unjust discrimination is prohibited by sections 2 and 3 of the interstate commerce act. What constitutes unjust discrimination may be ascertained from the language of these sections, as well as of the section which authorizes the circuit court to redress it by *mandamus*. By section 2 it consists in charging one person a different compensation than is charged another for doing "the like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." By section 3 it consists in giving "any undue or unreasonable preference or advantage" to any particular shipper, or subjecting him to any undue or unreasonable prejudice or disadvantage "in any respect whatever." The former relates to unjust discrimination in rates. The latter is comprehensive enough, standing alone, to include every form of unjust discrimination, not only in rates, but also in the conveniences and facilities supplied to shippers in any of the details of the carrying service; and such is the judicial construction in England of the term "undue or unreasonable preference or advantage," as used in the English "railway and canal traffic act," (17 & 18 Vict. c. 31, § 2). It is provided in section 3 that all the common carriers subject to the provisions of the act "shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." This provision refers only to facilities between connecting lines at terminal points for the interchange of traffic and passengers; and the term "facilities" does not embrace car equipment for the transportation of freight over the carrier's own road. *Scofield v. Lake Shore & M. S. R. Co.*, 2 Int. St. Com. R. 90, 116, 34 Am. & Eng. R. Cas. 685.

These sections, by declaring the specified acts of discrimination unlawful, qualify materially in some respects the

common-law rights and obligations of the carriers mentioned. By the common law, although public carriers are not permitted to make unreasonable discrimination in performing the services which they undertake between those whom it is their duty to serve, the discrimination which is unreasonable is such only as inures to the undue advantage of one person or class of persons in consequence of some injustice inflicted upon another. The carrier is not obliged to treat all who patronize him with absolute equality. Thus it is his privilege to charge less than fair compensation to one person, or to a class of persons; and others cannot justly complain so long as he carries on reasonable terms for them. *Menacho v. Ward*, 27 Fed. Rep. 530. That privilege can no longer be exercised under the interstate commerce act by the carriers subjected to its provisions in the transportation of a like kind of traffic under substantially similar circumstances and conditions. Again, it is no part of the common-law obligation of railway companies to furnish the same facilities or instrumentalities of transportation to all alike; and while it is unquestionably their duty to furnish suitable and adequate facilities for all reasonable necessities of the business they engage in, they may nevertheless choose their own appropriate means of carriage. This was the doctrine of the *Express Cases*, 117 U. S. 1, in which it was held by the supreme court that railroad companies are not required by usage or by the common law to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled. But the interstate commerce act requires them to treat all impartially; and if one shipper is subjected to any undue or unreasonable prejudice or disadvantage because a railway company permits another shipper to use his own cars for carrying traffic over its road, their right to choose their own appropriate means of carriage is to that extent curtailed.

It is unnecessary to decide in the present case whether the respondent would be guilty of unjust discrimination towards the American Live Stock Transportation Company, or indirectly towards Morris, if it should refuse to enter into such an arrangement with that company as it has made with the Lackawanna Live Stock Express Company. The respondent does not prevent either relator from transporting cattle over its road in the cars furnished to it by the Lackawanna Live Stock Express Company; and, if the facts set forth in the return are true, the cars belonging to the Lackawanna Express Company differ so in construction from those of the American Live Stock Transportation Company, as well as from

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those of ordinary private stock-cars, that the respondent can use them more profitably and conveniently than the others, because they can be used for its ordinary coal traffic when not in use for carrying cattle. So, also, if the facts in the return are true, the contract made with the Lackawanna Live Stock Express Company secures to the respondent the advantage of having a definite number of cars always at its disposal for use in its general business,—an advantage which it could not have by using the cars of the American Live Stock Express Company, or the cars of any other other shipper, in the absence of such a contract. Thus there are reciprocal rights and obligations arising from the contract between the respondent and the Lackawanna Live Stock Express Company, and special circumstances in their relations affecting the question of compensation, which are not present in the conditions of the service which the relators demand. In short, there is no unjust discrimination towards the relators as to rates, because the respondent does not refuse to carry traffic for them under substantially similar circumstances and conditions to those of its service for the Lackawanna Live Stock Express Company; and for the same reason it does not give the latter any unreasonable preference or advantage over the relators, but only such a preference or advantage as it may fairly give because of the difference in cost, expense, and the exceptional character of the service. The case of *Burton Stock Car Co. v. Chicago B. & Q. R. Co.*, 1 Int. St. Com. R. 132, is instructive upon this point. See, also, *Nicholson v. Railway Co.*, 5 C. B. (N. S.), 366; *Cooper v. Railroad Co.*, 4 C. B. (N. S.), 738; *Oxlade v. Railroad Co.*, 1 C. B. (N. S.), 454.

The section which authorizes the court to grant a *mandamus* confers the discretionary power, when any question of fact as to the proper compensation of the carrier is raised by the pleadings, to issue the writ, “notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into court, or otherwise as the court may think proper, pending the determination of the question of fact.” Relying upon this language of the section, the relators insist that the peremptory *mandamus* should be allowed, and the question of proper compensation for the respondent be reserved. This contention ignores the consideration that until a case of unjust discrimination is shown to exist the court is not authorized to award any relief whatever. If it were shown that the respondent refuses to receive traffic in the cars of the American Live Stock Transportation Company, while receiving it for another in substantially the same way, then

Power of
court to grant
mandamus.

it might be competent to decide that the relators are prevented from having their traffic moved upon like favorable terms or conditions, and the question of compensation might be determined at a later stage in the case. Until this is shown, however, they do not make out a case for the intervention of the court. For these reasons the return is held to be sufficient.

Unjust Discrimination—Obligation of Company to Furnish Adequate Car Equipments.—See *Riddle v. Baltimore & O. R. Co.*, (I. C. C.) 33 Am. & Eng. R. Cas. 653; *Scofield v. Lake Shore & S. M. R. Co.*, 2 Int. Com. Com. Rep. 90.

Same—Obligation of Company to Use Improved Stock Car.—See *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.*, 1 Int. Com. Com. Rep. 132.

Interstate Commerce Act—Similar and Contemporaneous Services.—The carriage of two barrels of sugar for one person and the carriage of one barrel of sugar for another person two days later, between the same points and over the same route, are contemporaneous and like services within the meaning of the Interstate Commerce Act, § 3, and the two services are not rendered substantially dissimilar by the fact that the carrier received a greater quantity of traffic from the first shipper than from the second. *United States v. Tozer*, 39 Fed. Rep. 369.

Same—Through and Local Rates.—Defendant's railroad received from a connecting line two barrels of sugar on June 15, 1887, and transported them from Hannibal, Mo., to Hepler, Kan. Defendant collected the whole charge for the carriage of the sugar from Chicago to Hepler, the proportion of the rate retained by the defendant's railroad being 34 cents per hundred pounds. On June 7, 1887, defendant, as agent of the railroad, collected from a shipper 46 cents per hundred pounds for the transportation of one barrel of sugar over the line of his company's road from Hannibal, Mo., to Hepler, Kan. Held that the two services were not rendered under circumstances or conditions substantially similar; but that the question whether the difference of 12 cents per cwt. between the local rate and its proportion of the through rate was an undue preference or advantage over the local shipper within the meaning of the Interstate Commerce Act, § 3, was for the jury. *United States v. Tozer*, 39 Fed. Rep. 369.

Same—Services for Different Parties.—A wholesale grocer in Hannibal, Mo., ordered his broker in Chicago to ship two barrels of sugar from Chicago to Hepler, Kan. The shipment was made by the C. B. & Q. R. Co., and the bill of lading contained a reservation to the company of the right to forward the property from the terminus of that company's road by the road of any connecting carrier whom it might select. At Hannibal, Mo., it selected the Missouri Pac. R. Co. to complete the carriage to the point of destination. The sugar was there unloaded, placed in a warehouse of the Missouri Pac. R. Co., and thence loaded into one of its cars and carried forward by it to Hepler. The total freight charge from Chicago to Hepler was paid to the Missouri Pac. R. Co. on the arrival of the property by the consignee, the rate being 51 cents per hundred. The C. B. & Q. R. Co. and the Missouri Pac. R. Co. had a standing arrangement in force at the time of the transaction whereby the rate on sugar to points on the Missouri Pacific's road in Kansas, Nebraska and Indian Territory, via the C. B. & Q. R. Co., the town of Hannibal and the Missouri Pac. R. Co., was to be ascertained by adding to the established rate from Hannibal to such point, an arbitrary sum of 5 cents per hundred. The rate from Hannibal to Hepler over the Missouri Pac. R. Co. on shipments originating in Han-

nibal, was 46 cents per hundred pounds on sugar. Of the 51 cents per hundred actually paid, the Missouri Pac. R. Co. retained 34 cents only. Subsequently, the wholesale grocer shipped from Hannibal one barrel of sugar to the same consignee over the Missouri Pac. R. Co. and paid the freight charges in advance. For the latter service, the defendant, as agent of the railroad company charged the shipper at the rate of 46 cents per hundred from Hannibal to Hepler. *Held*, that the two services were not rendered for one and the same party in such sense that there could be no preference or discrimination within the meaning of the Interstate Commerce law. *United States v. Tozer*, 39 Fed. Rep. 904.

Same—Undue Preferences—Facilities and Rates.—Section 3 of the Interstate Commerce Act which declares that it shall be unlawful for a carrier to give "an undue or unreasonable preference" to any person, or to subject any person to any undue or unreasonable prejudice or disadvantage "in any respect whatsoever," applies not only to facilities afforded to shippers, but also to rates charged. *United States v. Tozer*, 39 Fed. Rep. 904.

Same—Connecting Carriers—Through Rate.—Connecting carriers cannot so adjust rates for the through shipment of goods over the connecting lines as to subject a person at an intermediate point on the line of the forwarding carrier to an undue or unreasonable disadvantage, and the question whether the difference between the proportion of the through rate applicable to the distance between the intermediate point and the final destination, and the local rate for the same distance operates to create an undue prejudice or disadvantage, is for the jury. *United States v. Tozer*, 39 Fed. Rep. 904.

BAYLES

v.

KANSAS PACIFIC R. CO.

(*Colorado Supreme Court, September 13, 1889.*)

Carriers of Goods—Unjust Discrimination—Special Rate.—A contract by which a common carrier agrees to give a shipper of goods a special rate if he will ship the whole of his freight by the carrier's line, is not an undue or unreasonable discrimination either at common law or under the provisions of the Colorado constitution, if it is not shown that the carrier agreed to give the shipper an exclusive privilege.

Same—Authority of Receiver of Railroad Company.—Where it is alleged and admitted that the receiver of a railroad company managed and controlled the business of the company and operated the railway, a contract relative to the carriage of goods will not be held to be in violation of his authority until the authority conferred upon him by the court is shown.

Same—Cause of Action—Pleading—Prayer for Reformation of Contract.—The complaint in an action against a railroad company alleged that at the time the contract in question was made, the person contracting was the

agent of the receiver of the defendant; that he made the contract as such agent; that by it he intended to bind the receiver; that the contract was adopted by the receiver as his own; that when discharged from his office, the defendant obligated itself to pay any claims against the receiver then outstanding, and that the claim in question was existing at the time of his discharge. *Held* that these allegations were sufficient to state a cause of action, even though the complaint prayed for the reformation of the contract, and the plaintiff has failed to show that there was a mutual mistake in the manner of executing it.

Same—Parties—Receiver of Railroad Company.—Where the receiver of a railroad company has been discharged, he is not a necessary party to an action against the railroad company to recover the amount of a claim founded upon a contract assumed by the railroad company even though a reformation of the contract is prayed for as part of the relief asked.

REED, C., dissents.

APPEAL from Superior Court of Denver.

Browne & Putnam for appellant.

Teller & Orahod for appellee.

PATTERSON, C.—The question presented for consideration in this case arises upon the judgment of the court below, sustaining a demurrer to the complaint. The grounds of demurrer were, in substance, (1) that the complaint did not state facts sufficient to constitute a cause of action; (2) that the contract sought to be enforced was void as against public policy; (3) that there was a defect of parties defendant. To discuss the case intelligently a careful analysis of the contract and the allegations of the complaint is necessary. The contract is set out *in hæc verba*, and is as follows: "This agreement, made this 20th day of March, A. D. 1878, by and between B. H. Baylis, of Denver, Colorado, party of the first part, and S. R. Ainsley, general agent of and representing the Kansas Pacific Railway Co., party of the second part, witnesseth, that the said party of the first part hereby agrees to ship all merchandise bought by him, and shipped from eastern cities, by the Kansas Pacific Railway Co., in consideration of which the said party, on behalf of and representing the Kansas Pacific Railway Co., agrees to transport all merchandise consigned to said party of the first part from (1) New York to Denver, Colorado, one dollar per hundred pounds, regardless of classification; (2) Chicago, Ill., to Denver, Colo., \$110 per car load, and eighty cents per hundred pounds on less than car-load shipments; (3) St. Louis, Missouri, to Denver, Colo., eighty cents per hundred pounds on less than car-load shipments, and \$110 per car-load lots; (4) Kansas City, Mo., and Leavenworth, Kan., (proper,) ninety dollars per car-load, and sixty cents per hundred pounds on less than car-load shipments. It is agreed that the above rates shall be and remain in force until January first, 1880. And

it is further agreed that the said party of the second part shall rectify and correct all overcharges, and protect the said party of the first part in the above named rates, in Denver, Colo. And it is further agreed that when merchandise shipped to the care of the Kansas Pacific Railway Co., shall be diverted to other roads, and be delivered by other than the Kansas Pacific Railway Co., it shall in no way work a forfeiture of this contract. (Signed) B. H. BAYLES. S. R. AINSLEY, Agt. K. P. Ry." It is then alleged that prior to the date of said contract, by order and decree of the circuit court of the United States for the district of Kansas, in a certain suit wherein John A. Stewart and others were plaintiffs, and the Kansas Pacific Railway Co., was defendant, one S. T. Smith had been appointed, and had duly qualified as receiver, and had taken possession of the said railway for its entire length, from Kansas City, Mo., to the city of Denver, and from that time until June 14, 1879, had managed said railway, and that all transportation of freight was contracted for and controlled by him as such receiver. This allegation is followed by the statement that S. R. Ainsley, at the time the contract was made, and during all of his term of office, was the general agent of the said receiver, at the city of Denver, and authorized to execute, on his behalf, agreements for the transportation of freight, including the contract above set forth; that by mutual mistake in the form of the agreement the contract was executed by said Ainsley as representative of the said railway company, rather than said receiver. It is then alleged that the contract was adopted, and partially performed, by the said receiver, and that freight of plaintiff was transported under such contract by him, through his agents and employes, and all money paid by plaintiff was received by his agents, and used by him in the management of said railway, and accounted for by him upon his final discharge. It is then stated that the railway remained in the possession and under the control of the receiver, until June 4, 1879, when the circuit court decreed that it should be delivered to and retained by the railway company, which order was complied with by the receiver, who, on the 14th day of the same month, turned over to the railway company all moneys in his hands, amounting to the sum of \$265,791.20, and took a receipt therefor, by which it was stipulated and agreed by the railway company that "any other claims against the receiver should be assumed and paid by the said railway company," which said adjustment was afterwards approved by a final decree, rendered October 17, 1884. It is then stated that at the time the money was so paid to defendant by the receiver the indebtedness sought to be recovered in this action was a valid claim against the receiver, and one

of the debts which the railway company assumed and agreed to pay. It is then alleged that under the provisions of the contract plaintiff, in performance thereof, shipped all merchandise bought by him in eastern cities over the Kansas Pacific Railway to Denver, and that the total freight on such merchandise aggregated the sum of \$10,619.69, which sum he from time to time paid to the agents of the receiver in full; that under the contract he was entitled to a rebate on the amounts paid for freight, in the sum of \$2,565.91; that of that sum the agent of the receiver, with his full knowledge and consent, paid to the plaintiff at various times, and in different amounts, the sum of \$1,353.53, leaving a balance still unpaid on March 3, 1879, of \$1,211.39; that the railway company refused to pay the balance remaining unpaid; that plaintiff paid the full freight rates on merchandise shipped by him as aforesaid, and by the terms of the contract was entitled to a return of said sum of \$2,565.91, "which sum was the aggregate of overcharges made by said receiver thereon in consequence of some running arrangement between the said receiver and certain other connecting lines, the nature of which is wholly unknown to plaintiff, and cannot, therefore, be stated." The second cause of action need not be stated. Judgment is prayed for the reformation of the contract, so that the same shall conform in its execution to the real intention of the parties, and for the sum of \$1,211.39 upon the first cause of action, and for the sum of \$2,000 upon the second cause of action, and for costs. The demurrer was sustained upon the sole ground that the contract sought to be enforced was void as against public policy. The court, in effect, held that under the contract, the plaintiff secured rates for the transportation of merchandise, which were less than the published schedule rates of defendant; that such charges amounted to an unjust discrimination, within the meaning of the law and the constitution of this state, of which the court could take cognizance upon demurrer, without proof of any of the facts, circumstances, conditions or surroundings under which the contract was made, and which may have existed while the same was being performed by the plaintiff. This decision, and the principles which are invoked to sustain it, will now be discussed.

The naked facts of the case are, simply, that upon the day named a contract was made, by the terms of which plaintiff, for a certain period was to have a special rate upon the merchandise purchased by him in eastern cities, in consideration of his undertaking to consign such merchandise from Kansas City via Kansas Pacific Railway. This rate applied only to shipments made at the eastern terminus of the railway, or which were shipped from eastern

Effect of contract.

cities consigned to appellee. Whether the rate was either different or less than that given to other shippers residing in Denver, under like conditions, and under the same circumstances, does not appear. It does not appear, either directly or indirectly, that the special rate given to plaintiff was an exclusive privilege enjoyed by him alone. There is nothing to warrant the inference that any shipper residing in Denver could not have secured the same rate upon property which was to be shipped by him from eastern cities. There is nothing in the complaint showing that any shipper, whether he desired to ship much or little, might not have secured the same rate, upon application to appellee. Neither is there anything to warrant the assumption that the arrangement was a secret one. Neither is there any reason for the inference that it was the intention of the railway company to give to appellant a preference. There was no promise not to give the same rate to others. The railway company remained at liberty to charge others the same or lower rates. Upon all the facts, therefore, if effect be given not only to the language of the contract itself, but to every allegation of the complaint, it is clear that the purpose of the contract was to give appellant a special rate, and nothing more. This contract was performed by him, and partially performed by the railway company. The ultimate conclusion to be drawn from the entire record is that appellant secured a rate which was less than the regular schedule rates in force at the time; that there was some inequality in charges made by the appellee, but nothing to show that such inequality in charges was practiced towards those who shipped property under like circumstances and conditions. Do these facts, standing alone, warrant the conclusion that, within the meaning of the law and of the constitution, an unjust discrimination was intended, which rendered the contract void as against public policy?

It is a well-settled elementary principle of the law of common carriers that mere inequality in charges does not amount to unjust discrimination. The requirement of the law is that the charge made shall be reasonable. A claim against a common carrier cannot be predicated upon the bare fact that the amount paid by one is greater than the amount paid by another. At common law the question is whether, under all the circumstances the charge is reasonable. Complete uniformity in charges is not obligatory. This principle prevails in all states, except where it has been modified by legislative enactment. In the administration of the law the principle itself has never been modified, but the courts have declared in many cases that there must be no unjust discrimination. This too, has come

**Inequality of
charges is not
discrimina-
tion.**

to be an elementary principle. Charges, therefore, must not only be reasonable, but equal, when the circumstances and conditions are the same. Privileges tending to give a shipper a monopoly, which may injuriously affect those engaged in like pursuit, are declared to be unjust. Contracts, which tend to create such preferences, are held to be void as against public policy. These principles of the common law remain in full force, in practically every state. In this state they are made a part of the organic law, from which neither the courts nor the legislature can depart.

Attention is here called to a few of the authorities bearing upon these principles. "Railroad companies may lawfully make contracts to refund to a shipper a certain portion of the stipulated or established freight, by the name of 'drawbacks' or 'rebates;' but an agreement not to allow the same drawback to others is against public policy and void. But if such objectionable part of the contract is severable, it will not effect the validity of the entire contract." 2 Ror. R. R. 1375. In the case of *McNees v. Railway Co.*, 22 Mo. App. 224, the action was brought to recover rebates upon a contract practically the same as that stated in the complaint in the case at bar. A demurrer was interposed to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, and the question argued and decided was whether the contract set forth was void as against public policy. HALL, J., in the course of his opinion, said: "The contract was not illegal and void. It was not within the prohibition of Rev. St. § 815, or § 821. Neither was it within the prohibition of the common law against any distinction or discrimination being made by a common carrier in favor of one against another. It was not a discrimination against any one for the defendant to agree with plaintiff to charge him less than the regular tariff rates. The regular tariff rates were fixed and known. By the contract, by means of a rebate, the plaintiff was to be charged less than those rates, but wholly without regard to what others were to be charged. The object of the contract was not to discriminate against any one, but was simply to give the plaintiff a less rate than the fixed and regular rate. By the contract no discrimination was made between the plaintiff and others. Under the contract the defendant might not only have charged every one the same rate given to plaintiff, but even a less rate than that rate. To charge one a rate less than the regular fixed rate is not discrimination. But to charge one a higher rate than the lowest rate given to any one else, under certain circumstances, is discrimination." The sections of the statute cited by the court need not be

Authorities
examined.

quoted here. The statute was enacted to prevent unjust discrimination.

In the case of *Christie v. Missouri Pac. R. Co.*, 94 Mo. 453, 32 Am. & Eng. R. Cas. 413, it is held that "a common carrier has the right to contract to ship freight at a lower rate than the published tariff rate, if he choose to do so; and such contract is not against public policy, unless the privilege to ship at such rate is granted exclusively to the shipper with whom it is made, or is denied to other shippers. It is the exclusiveness of the privilege granted to one and denied to another which makes the discrimination, and renders the contract void as against public policy. No such exclusiveness or discrimination appears in the contract sued upon, and the objection of defendant to the reception of any evidence was properly overruled." In this case the action was based upon an alleged contract, whereby it was agreed that the plaintiff should ship grain of various kinds from certain stations in the state of Kansas to Chicago, Ill., and that on presentation of bills for such shipments, the plaintiff should pay the usual and ordinary rates therefor, according to defendant's tariff rates, and that defendant should pay to plaintiff all sums of money which defendant should receive over and above the rate agreed upon between the parties. The object of the suit was to recover from defendant the difference between the sum paid by plaintiff according to defendant's tariff rates and the amount that was, by the agreement of the parties, to be paid. *Ragan v. Aiken*, 9 Lea. (Tenn.), 609; 9 Am. & Eng. R. Cas. 201; *Ex parte Benson*, 18 S. Car. 39; *Avinger v. South Carolina R. Co.* 29 S. Car. 265; 35 Am. & Eng. R. Cas. 519; *Langdon v. Robertson*, 13 Ont. 497; 30 Am. & Eng. R. Cas. 23; *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623. The cases cited clearly establish the proposition that mere inequality between the rate charged a shipper and the published tariff rates does not constitute unjust discrimination, within the meaning of the law.

The court below decided the case upon the authority of *Scofield v. Lake Shore & M. S. R. Co.*, 43 Ohio St. 571; 23 Am. & Eng. R. Cas. 612. The case is well considered, and contains a most exhaustive and instructive discussion of the question of discrimination, but nowhere in all the 50 pages occupied by the discussion can there be found a syllable upon which the conclusion that the contract in the case at bar was void as against public policy can be predicated. The principle decided, briefly stated, is as follows: "Where a lower rate is given by such corporation to a favored shipper, which is intended to give, and necessarily gives, an exclusive monopoly to the favored shipper, affecting the business and de-

stroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances." *Messenger v. Pennsylvania R. Co.*, 36 N. J. Law, 407, is cited in support of the judgment. The principle in that case is precisely the same as that decided in the Ohio case, and is stated in the syllabus in the following language: "An agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others is void, as creating an illegal preference." The same case was reviewed a second time, and is reported in 37 N. J. Law, at page 531. The doctrine of these two cases is unquestionably sustained both by reason and authority. Nevertheless, in the same state, in the case of *Stewart v. Lehigh Valley R. Co.*, 38 N. J. Law, 505, it was expressly held that "a covenant by the Morris Canal & Banking Company not to allow to others a drawback from established rates on the transportation of merchandise over its canal, which it agreed to allow to the covenantee, is against public policy, and void. Such a covenant does not, however, invalidate the entire contract in which it exists, and from the remainder of which it is severable. The agreement to allow the drawback to the covenantee is valid and enforceable, and others are entitled to equally reasonable terms." In the case of *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309, BAXTER, J., in discussing the question of discrimination, says: "It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination inures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter."

In the light of these authorities, attention is now called to the provisions of the constitution which relate to this subject. Section 6, art. 15, declares that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employe thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power." That this is but a declaration of the common law is conceded. By this provision the elementary principles of the law of common carriers, above defined, are adopted as a

Provisions of
Colorado con-
stitution.

part of the organic law of the state. Railway companies organized or authorized to do business within this state are subject to the law as declared by this constitutional provision. The language of the section is "that no undue or unreasonable discrimination shall be made in charges." By fair intendment it is clear that railway companies, under this provision, may discriminate, so long as such discrimination is neither "undue nor unjust." While this provision remains in force it may well be doubted whether either this court or the legislature can declare that a railway company shall not discriminate in charges at all, or that mere inequality in rates shall constitute an "undue or unjust" discrimination. By this provision railway companies are left at liberty to regulate the rates of transportation, and are not answerable for their conduct, in this respect, unless such charges are unreasonable, and by "undue and unjust" discrimination tend to create exclusive privileges, to the detriment of other shippers or the public at large.

It is clear that the contract set forth in the complaint, unless supplemented by proof of facts tending to establish an exclusive privilege, or an unlawful preference, is not void within the meaning of this section. There is no presumption that the contract is void; and in this, as in all other cases, when mere equality in charges appears, the parties should be allowed to show that by reason of existing circumstances or conditions no unjust preference or discrimination was either created or intended. The court cannot act *ex mero motu*. The burden is upon him who charges illegality. The defendant should have been required to answer, and to establish the iniquity of the agreement by proof.

In this connection attention is called to the case of Indianapolis D. & S. R. Co. v. Ervin, 118 Ill. 250, 27 Am. & Eng. R. Cas. 8, which has been cited as authority in support of the judgment. In the syllabus of that case it is stated that "a contract between a railroad company and a shipper, that the latter shall pay the regular and established rates of freight, the same as all other shippers, and that the company shall pay back to him, by way of rebate, a certain portion of the freight so charged and paid, whereby such shipper will pay a less rate for transportation than that paid by others and the public generally, for like services, under similar circumstances and for like distance, is void as being against public policy at the common law, and in violation of the statute against unjust discriminations." An examination of this case will clearly show first, that the doctrine above stated is not sustained by the

Contract not
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sence of ex-
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Indianapolis
D. & S. R. Co.
v. Ervin.

opinion; and second, that the decision is based upon a statute of which the constitutional provision of this state is in no sense a counterpart. The case suggests an examination and discussion of the course of legislative enactment and judicial decision in Illinois. The suit was brought to recover drawbacks or rebates. The railroad company, by special plea, set up the contract, under which the plaintiff claimed. A demurrer to the special plea, was sustained. Upon the trial, under the general issue, the railway company offered to prove that the arrangement by which the rebates were agreed to be paid was a secret arrangement; "that the rates, so given to the plaintiff, were private, and not open to the public generally, and less than were charged to the public generally, less than the schedule rates, and less than any other shipper had, except Davis & Finney; that plaintiffs and Davis & Finney did the bulk of the grain business on the road; that no other grain shippers had such special rates and could not compete with plaintiffs." This evidence was excluded. The legislature had passed two different statutes. The one in force when the case of *Toledo W. & W. R. Co. v. Elliott*, 76 Ill. 67, (cited by appellant), was decided, had been repealed, and a subsequent statute enacted, which was in force when *Indianapolis D. & S. R. Co. v. Evrin*, *supra*, was before the court. By the new statute it was declared, among other things, that "all such discriminating rates, charges, collections, or receipts, whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be deemed and taken against such railroad corporations as *prima facie* evidence of the unjust discriminations prohibited by the provisions of this act." Rev. St. Ill. 1874, c. 114, § 88. This statute, in effect, established a new rule of evidence, which did not prevail in that state prior to its enactment. *Toledo W. & W. R. Co. v. Elliott*, 76 Ill. 67. Discriminating rates are declared to be *prima facie* evidence of the unjust discriminations prohibited by the act. No new principle was created. Discriminating rates were not made conclusive evidence of unjust discrimination under that statute. Indeed, the legislature of that state could not have lawfully enacted such a principle, under the constitution, as will be hereafter seen. The enactment of this statute resulted from a former decision of the supreme court construing a prior act. *Chicago, & A. R. Co. v. People*, 67 Ill. 11. The act in force prior to 1873 prohibited any discrimination whatever in charges, and was intended to give effect to a constitutional provision, which reads as follows: "The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the differ-

ent roads in the state, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises." Article 11, § 15. In the case last cited Chief Justice LAWRENCE says: "This provision, expressly directing the legislature to pass laws to prevent unjust discrimination, is a recognition of the palpable fact that there may be discriminations which are not unjust, and by implication it restrains the power of the legislature to a prohibition of those which are unjust. That was undoubtedly the object of the legislature in passing the existing law. * * * But the act itself goes further. It forbids any discrimination whatever, under any circumstances, and whether just or unjust, in the charges for transporting the same classes of freight over equal distances, even though moving in opposite directions, and does not permit the companies to show that the discrimination is not unjust. The mere proof of the discrimination makes out a case against the railway companies, which they are not allowed to meet by evidence, showing the reason or propriety of the discrimination, and then, upon this sort of *ex parte* trial, imposes, as a penalty for the offense, a forfeiture of the franchise, which would often be equivalent to a fine of millions of dollars." He further says: "That the naked fact that a railway company charges a larger sum for transporting freight of the same class over a given distance than it is charging for the same distance over another part of its road, or in the opposite direction, is not of itself, conclusive evidence of an unjust discrimination, will be manifest on a moment's consideration." Also: "We give this illustration for the purpose of showing that a difference of price for the same distance of transportation is not necessarily an unjust discrimination, and that any law must be fatally defective which infers guilt as a conclusive presumption, from the mere fact of difference of rates, without permitting the companies to show why the different rates were adopted." And, finally: "The opinion of the court is that, while the legislature has an unquestionable power to prohibit unjust discrimination in railway freights, no prosecution can be maintained under the existing act, until amended, because it does not prohibit unjust discrimination merely, but discrimination of any character, and because it does not allow the companies to explain the reason of the discrimination, but forfeits their franchise upon an arbitrary and conclusive presumption of guilt, to be drawn from the proof of an act that might be shown to be perfectly innocent. In these particulars the existing act violates the spirit of the constitution." This decision was made at the January term, 1873. The act construed in Indianapolis, D. & S. R. Co.

v. Ervin, 118 Ill. 250, 27 Am. & Eng. R. Cas. 8, was approved May 2, 1873, and went into force in July of the same year.

The above discussion of the constitution and statutes of Illinois renders it clear that the case of Indianapolis D. & S. R. Co. *v. Ervin*, *supra*, can have no weight in this state. The legislature of Illinois has laid down a new rule of evidence, under which the burden of justifying such a contract is upon the party who seeks to enforce it. At common law its invalidity must be shown by the party who attacks it. In this state the common law prevails. The contract sought to be enforced in this case was, therefore, presumptively a lawful contract. The complaint, as an entirety, expressly shows that the appellant secured special rates, and by inference that such rates were less than schedule rates. For this reason alone the court below declared that the contract was against public policy. This was error. The demurrer should have been overruled, and the defendant required to answer. If defendant had answered that the contract was against public policy, because an unjust discrimination was intended, and the answer had been sustained by proof, the plaintiff could not have recovered.

The remaining questions in the case will now be briefly considered. The contention that the receiver was without power to make the contract is without merit. It is expressly alleged, and, in effect, admitted by the demurrer, that the receiver managed and controlled the business of the company; that he operated the railway. It cannot be assumed that the contract was in violation of his authority, until his authority in the premises is shown.

Power of receiver.

Upon the assumption that the contract was valid, other questions suggested by appellee's counsel will be briefly discussed. The first general ground of demurrer stated is that the complaint does not state facts sufficient to constitute a cause of action. The rule is well established in this state that if there are facts well pleaded, sufficient to entitle a party to any relief, a demurrer will not be sustained upon this ground. In *Herfort v. Cramer*, 7 Colo. 483, it is held that "the pleading, to be subject to demurrer, 'must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever.'" If the complaint is tested by this principle can it be said that, upon all the facts alleged, no cause of action whatever can be predicated? It appears that at the time the contract was made Ainsley was the agent of the receiver of appellee; that he made the contract as such agent;

Sufficiency of complaint.

that by it he intended to bind the receiver; that the contract was adopted by the receiver as his own; that at the time the contract was made, and during all its life, he was operating the railway, and that he performed it in part by paying rebates according to its terms; that he received the moneys paid for freight by plaintiff, and used the same in the operation of the road; that he accounted for and paid over such moneys when discharged from his office; that he took a receipt from the railway company, by the terms of which that company obligated itself to pay any other claims against him then outstanding; that this claim was existing at the time of his discharge. These allegations clearly state a cause of action. The contention that the cause is equitable, and that the allegations of the complaint are insufficient to entitle plaintiff to a decree reforming the contract for mutual mistake, cannot be entertained. It is clear that upon proof of all the allegations of the complaint plaintiff would be entitled to a judgment, even if he failed to show that there was a mutual mistake in the manner of executing the contract, within the meaning of equitable principles. If the complaint fails to show that the plaintiff is entitled to the relief asked, it is not, for that reason, demurrable, because it does not state facts sufficient to constitute a cause of action. *White v. Lyons*, 42 Cal. 269; *Canty v. Latterner*, 31 Minn. 239, 15 Am. & Eng. R. Cas. 380; *Hewitt v. Powers*, 84 Ind. 295; *Bayless v. Glenn*, 72 Ind. 5; *Moritz v. Splitt*, 55 Wis. 441; *Tewksbury v. Schulenberg*, 41 Wis. 584.

It is further contended that the complaint is demurrable for defect of parties defendant; that S. T. Smith should have been made a party, for the reason that, as a part of the relief asked, a reformation of the contract was prayed for. **Parties.** It appears that Smith was discharged from his receivership long prior to the commencement of this action. It is a well-settled principle that a receiver is not personally liable upon a contract or covenant made officially. It has already been said that it affirmatively appears in the complaint that this was the contract of the receiver, and not of Smith as an individual. This being so, it would be idle to make him a party, as no relief could be had against him. He was neither a necessary nor a proper party to the action. *High, Rec.* §§ 272, 273; *Arnold v. Bank*, 27 Barb. (N. Y.), 425; *Livingston v. Pettigrew*, 7 Lans. (N. Y.), 405; *Trust Co. v. Railroad Co.*, 2 McCrary, (U. S.), 181, 7 Fed. Rep. 537; *Brown v. Wabash R. Co.*, 96 Ill. 297, 1 Am. & Eng. R. Cas. 626. The judgment should be reversed, and the cause remanded, with leave to appellee to answer.

RICHMOND, C., concurs. REED, C., dissents.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed, and the cause remanded to the district court of Arapahoe county as successor under the law to the superior court.

Discrimination Between Shippers—Special Rates, Rebates, etc.—See *Hays v. Pennsylvania Co. (C. C.)*, 6 Am. & Eng. R. Cas. 594; *Indianapolis, D. & S. R. Co. v. Ervin (Ill.)*, 27 *Id.* 8, note 12; *Rothschild v. Wabash, St. L. & P. R. Co. (Mo.)*, 30 *Id.* 76; *Scofield v. Lake Shore & M. S. R. Co. (Ohio)*, 23 *Id.* 612, note 644; *Avinger v. South Carolina R. Co. (S. Car.)*, 35 *Id.* 519, note 528; *Rogan v. Aiken (Tenn.)*, 9 *Id.* 201; *Houston & T. C. R. Co. v. Rust (Tex.)*, 9 *Id.* 123; notes, 30 *Id.* 78; 29 *Id.* 53 *et seq.*; 27 *Id.*, Appendix, 77; 9 *Id.* 343.

ROOT

v.

LONG ISLAND R. CO.

(New York Court of Appeals, Second Division, May 3, 1889.)

Unjust Discrimination—Agreement to Give Rebate—Question of Fact.—A contract by which a railroad company agrees to give a rebate in consideration of the contracting party constructing a coal dock upon its premises, of part of which the company is to have the use, cannot be said as matter of law to be against public policy and void as unjustly discriminating between shippers, but the question is one of fact and ought to be submitted to the jury.

APPEAL from General Term of the Supreme Court, Second Department.

Edward E. Sprague for appellant.

Francis Lynde Stetson for respondent.

HAIGHT, J.—In June, 1876, the defendant and one Quintard entered into a written contract, which, among other things, provided that Quintard should build at Long Island City upon the lands of the defendant a dock 250 feet long and 40 feet wide, and erect thereon a pocket for holding and storing coal, according to plans and specifications annexed. The defendant was to have the use of the south side of the dock, and also of 30 feet of the shore end, and the right to use the other portions thereof when not required by Quintard. In consideration therefor the defend-

Facts.

ant agreed with Quintard to transport in its cars all the coal in car-loads offered for transportation by him at a rebate of 15 cents per ton of 2,240 pounds from the regular tariff rates for coal transported by the defendant from time to time, except in the case of the coal carried for the Brooklyn Waterworks Company, with which company the defendant reserved the right to make a special rate, which should not be considered "the regular tariff rate." The defendant also agreed with Quintard to provide him with certain yard room and office room free of rent, and the contract was to continue for the term of 10 years, and at the termination of the contract the dock and structures were to be appraised, and the value thereof, less the sum of \$2,000 advanced by the defendant, to be paid to Quintard. Pursuant to this agreement the dock and coal-pocket were constructed at an expense of \$17,000, and coal in large quantities was shipped over the defendant's road by Quintard or his assignee under the contract, and it is for the rebate of 15 cents per ton upon the coal so shipped that this action was brought. The defense is that the contract was against public policy, and was therefore illegal and void.

The defendant is a railroad corporation organized under the laws of the state, and was therefore a common carrier of passengers and freight, and was subject to the duties and liabilities of such. These duties and liabilities have often been the subject of judicial consideration in the different states of the Union. In Illinois it has been held that a railroad corporation, although

Discrimination—Authorities examined.

permitted to establish its rates for transportation, must do so without injurious discrimination to individuals; that its charges must be reasonable. *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33. In Ohio it was held that where a railroad company gave a lower rate to a favored shipper with the intent to give such shipper an exclusive monopoly, thus affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances. *Scofield v. Lake Shore & M. S. R. Co.*, 43 Ohio St. 571, 23 Am. & Eng. R. Cas. 612. In New Jersey it has been held that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than it would carry under the same condition for others is void, as creating an illegal preference; that common carriers are public agents, transacting their business under an obligation to observe equality towards every member of the community, to serve all persons alike, without giving unjust or unreasonable advantages by way of facilities for the carriage, or rates for the transportation, of goods. *Messenger v. Pennsylvania R. Co.*, 36 N. J. Law, 407; *State v.*

Delaware L. & W. R. Co., 48 N. J. Law, 55, 23 Am. & Eng. R. Cas. 470. In New Hampshire it has been held that a railroad is bound to carry at reasonable rates commodities for all persons who offer them, as early as means will allow; that it cannot directly exercise unreasonable discrimination as to who and what it will carry; that it cannot impose unreasonable or unequal terms, facilities, or accommodations. *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430. To similar effect are cases in other states. *New England Express Co. v. Maine Cent. R. Co.*, 57 Me. 188; *Shipper v. Pennsylvania R. Co.*, 47 Pa. St. 338; *Fitchburg R. Co. v. Gage*, 12 Gray (Mass.), 393; *Menacho v. Ward*, 27 Fed. Rep. 529. In New York the authorities are exceedingly meager. The question was considered to some extent in the case of *Killmer v. New York Cent. & H. R. Co.*, 100 N. Y. 395, 23 Am. & Eng. R. Cas. 659, in which it was held that the reservation in the general act of the power of the legislature to regulate and reduce charges, where the earnings exceeded 10 per cent. of the capital actually expended, did not relieve the company from its common law duty as a common carrier; that the question as to what was a reasonable sum for the transportation of goods on the lines of a railroad in a given case is a complex question, into which enter many elements for consideration.

In determining the duty of a common carrier, we must be reasonable and just. The carrier should be permitted to charge reasonable compensation for the goods transported. He should not, however, be permitted to unreasonably or unjustly discriminate against other individuals, to the injury of their business, where the conditions are equal. So far as is reasonable, all should be treated alike; but we are aware that absolute equality cannot in all cases be required, for circumstances and conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than in others. Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must therefore be reasonable, and he must not unjustly discriminate against others, and in determining what would amount to unjust discrimination all the facts and circumstances must be taken into consideration. This raises a ques-

Duty of com-
mon carrier.

tion of fact, which must ordinarily be determined by the trial court. The question as to whether there was unjust discrimination embraced in the provisions of the contract does not appear to have been determined by the referee, for no finding of fact appears upon that subject. Neither does it appear that he was requested to find upon that question, and consequently there is no exception to the refusal to find thereon. Unless, therefore, we can determine the question as one of law, there is nothing upon this subject presented for review in this court.

Is the provision of the contract, therefore, providing for a rebate of 15 cents per ton from the regular tariff rates, an unjust discrimination as a matter of law? Had this provision stood alone, unqualified by other provisions, without the circumstances under which it was executed explaining the necessity therefor, we should be inclined to the opinion that it did provide for an unjust discrimination; but, upon referring to the contract, we see that the rebate was agreed to be paid in consideration for the dock and coal pocket which was to be constructed upon the defendant's premises at an expense of \$17,000, in part for the use and convenience of the defendant. Quintard was to load all the cars with the coal that was to be transported. It was understood that a large quantity of coal was to be shipped over defendants' line, thus increasing the business and income of the company. The facilities which Quintard was to provide for the loading of the coal, his services in loading the cars, the large quantities which he was to ship, in connection with the large sums of money that he had expended in the erection of the dock, in part for the use and accommodation of the defendant, are facts which tend to explain the provision of the contract complained of, and render it a question of fact for the determination of the trial court as to whether or not the rebate, under the circumstances of this case, amounted to an unjust discrimination, to the injury and prejudice of others. Therefore, in this case, the question is one of fact, and not of law; and, inasmuch as the discrimination has not been found to be unjust or unreasonable, the judgment cannot be disturbed.

The defendant in its answer alleged that the rebates accruing between the 1st day of January and the 31st day of October, 1879, were waived by the parties. The referee, upon request, refused to find that this was the case, and an exception was taken to such refusal. Had we been sitting as a trial court, it is possible we should have reached a different conclusion, but on review the evidence is too meager and indefinite to justify a reversal. The judgment should be affirmed with costs. All concur.

Unjust Discrimination—Agreements to Give Special Rates, Rebates, etc.—
See *Bayles v. Kansas Pac. R. Co.*, (Colo.) *ante*, p. 42, note p. 55.

Regina

v.

**RAILWAY COMMISSIONERS AND DISTINGTON IRON COMPANY,
LIMITED.**

(*L. R.*, 22 *Q. B. Div.* 642.)

Excessive Charges—Neglect to afford "Reasonable Facilities"—Jurisdiction of Commissioners.—The mere refusal by a railway company to receive and forward the traffic of persons in general except upon prepayment of charges somewhat in excess of the maximum authorized rates is not a [denial of "reasonable facilities," nor subjecting the senders of such traffic to "undue or unreasonable prejudice or disadvantage" within the meaning of the Railway and Canal Traffic Act, 1854, (17 & 18 Vict. chap. 31), § 2, or the Regulation of Railways Act, 1873 (36 & 37 Vict. chap. 48), and the Railway Commissioners have no jurisdiction under those Acts to restrain a railway company from making such charges, and cannot give themselves jurisdiction by finding as a fact that the demand of prepayment of such charges is a denial of "reasonable facilities" or subjecting persons or their traffic to "undue or unreasonable prejudice or disadvantage" within 17 & 18 Vict. chap. 31, § 2.

RULES calling upon the Railway Commissioners and the Distington Iron Company, Limited, to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding in the matter of a certain order of August 11, 1888.

The Distington Iron Company filed an application to the Railway Commissioners against the London and North Western Railway Company, and the Furness Railway Company, and the Cleator and Workington Junction Railway Company, and complained that the applicants' mineral traffic over the respondent companies' railways was improperly charged a terminal of 2*d.* a ton, and was thereby subjected to an undue prejudice and disadvantage in competition with similar traffic of other works seeking the same markets, and, after alleging facts in support of the complaint, prayed *inter alia*, for a restraining order. Answers were filed in denial by the railway companies, who, with the exception of the Cleator and Work-

ington Railway Company, disclaimed any right to charge a terminal.

At the hearing the application was amended by adding a paragraph stating, in the alternative, that the respondents refused to carry the traffic of the applicants except on payment of rates or charges exceeding the maximum amounts which the respondents were entitled to charge, and thereby subjected the applicants' traffic to undue prejudice and disadvantage; and that the applicants had furnished the respondents with particulars of the overcharges on which they relied; they contended that the maximum charge which the respondents were entitled to make was 1½d. per ton per mile, and prayed for an order restraining the respondents from continuing so to subject the said traffic to undue prejudice and disadvantage.

Counsel for the railway companies objected that the commissioners had no jurisdiction, inasmuch as the complaint was only of an overcharge, and that as it was not alleged that any other traders or class of traffic had been unduly preferred, or that the applicants were subjected to any prejudice or disadvantage other than the necessity of paying this overcharge, no violation of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. chap. 31), § 2, or of the Regulation of Railways Act, 1873 (36 & 37 Vict. chap. 48), was disclosed. They relied on *Great Western R. Co. v. Railway Commissioners* and *James Brown, L. R., 7 Q. B. Div. 182*. The Commissioners were of opinion that they had jurisdiction, and heard the case, and made the order of August 11, 1888, by which they found that the railway companies had refused to carry iron ore of the applicants except on the payment by them of rates in excess of the maximum authorized rates, and had thereby subjected the applicants to undue and unreasonable prejudice and disadvantage, and ordered and enjoined the railway companies to desist from so doing. The pleadings, the decision of the Commissioners, and the terms of the order are more fully stated in the judgment of this Court.

Sir R. E. Webster, Attorney General, (*R. S. Wright*, with him), for the Distington Iron Company, showed cause.

Sir H. James, Q. C., (*Pope*, Q. C., *Littler*, Q. C., and *Ernest Moon* with him) for the London and North Western and Furness Railway Companies.

Balfour Browne, Q. C., (*McCall* with him), for the Cleator and Workington Railway Company.

HUDDLESTON, B.—I am of opinion that the rules should be made absolute. The Distington Company applied to the Railway Commissioners to act under § 2 of the Act of 1854,

because the power to deal with these questions was given to the Court of Common Pleas by the Railway and Canal Traffic Act, 1854, and then that power was transferred to the Railway Commissioners by the Regulation of Railways Act, 1873. The 2nd section of the Act of 1854 is in substance re-enacted in the Act of 1873, with some additions, but for convenience we may refer to the section as it appears in the statute of 1854. "The first observation which arises upon this enactment," said Lord SELBORNE in *South Eastern R. Co. v. Railway Commissioners*, L. R., 6 Q. B. Div. 586, at p. 591, "is, that it does not enable the Commissioners to impose upon a railway company any new duties or obligations depending upon any mere exercise of the Commissioners' own judgment. Their authority is only to enquire into and to prevent violations or contraventions of the statute;" and in *Great Western R. Co. v. Railway Commissioners* and *James Brown*, L. R., 7 Q. B. Div. 182, at p. 193, 2 Am. & Eng. R. Cas. 617, BRAMWELL, L. J., said: "I think one ought not to suppose that the legislature intended to give to the commissioners a jurisdiction in matters which could be quite as well exercised by the ordinary courts of justice." Those observations shew that the commissioners have no authority except that which is given them by the statute, and that where there is power in the ordinary courts of justice to afford redress it is not probable that the commissioners would have jurisdiction.

Powers of
Railway Com-
missioners.

Jurisdiction,

What, then, is submitted to their jurisdiction under § 2 of the Railway and Canal Traffic Act, 1854? The first part relates to reasonable facilities for receiving and forwarding the traffic. The second part of that section is all one, as Sir HENRY JAMES pointed out; it is not two as the Attorney General suggested, but it is with reference to giving undue or unreasonable preference or advantage, or causing undue or unreasonable prejudice or disadvantage in any respect whatsoever. The terms are "preference and advantage," "prejudice and disadvantage," correlative terms. Then the third part is with reference to continuous lines of communications and railways. That is not my view of it only, but that is the view which the late LUSH, J., took in *South Eastern Ry. Co. v. Railway Commissioners*, L. R., 5 Q. B. Div. 217, and was the division approved of by Lord Selborne in his judgment in that case in the court of appeal. L. R., 6 Q. B. Div. 586, at pp. 591-2. Those are the three heads—first, facilities; second, preference and advantage or disadvantage; and third, continuous lines—over which the legislature gives the Railway Commissioners jurisdiction and power. Before I read the words of § 2, let me see what was the application

of the Distington Iron Company; and it is remarkable how vague and how inconclusive the pleadings are.

The original application referred principally to terminal charges; and in particulars given by the Distington Iron

Company they undertook "not to call any evidence
Excessive in support of the complaint contained in the sec-
charges. ond paragraph of the application that the appli-

cants' traffic is subjected to any undue prejudice and disadvantage in competition with similar traffic of other works," and although that may only apply to the second paragraph which is with reference to terminal charges, it clearly shows that any question of the traffic being subject to undue prejudice and disadvantage in competition with similar traffic of other works was abandoned by the applicants. I should think that when the Distington Company found themselves in a stress by the terminal charges being disclaimed, and a question of costs arose, they sought to get the commissioners to add the amendment: and it is the more remarkable, because in the answer by the London and North Western and the Furness Company, and in the subsequent answer in the same terms by the Cleator and Workington Junction Railway Company, they deny the statement that the applicants' traffic or any is charged with a terminal, or that the applicants are subject to any undue prejudice or disadvantage. Those were the two charges made, terminals and undue prejudice and disadvantage with reference to the terminals, not with reference to anything else. There is nothing said about being exposed to greater charges, or being prejudiced because there are greater charges. I find that when the Distington Company reply to the answer of the railway companies, they join issue and say "that the respondents have charged and continue to charge to the applicants, rates exceeding the maximum rates which the respondents are entitled to charge," and, "if the said charges cannot be justified as including terminals at Distington, they cannot be justified at all." It is conclusive to my mind that what they meant in the reply was this:—True, terminal charges are disclaimed, but we rely upon excessive charges—not excessive charges as suggested afterwards by the railway commissioners, but—excessive charges generally. If I am right in supposing that was the real question, there cannot be a doubt that the railway commissioners have no jurisdiction whatsoever, for Brown's Case, L. R., 7 Q. B. D. 182, 2 Am. & Eng. R. Cas. 617, decided that the question of excessive charges was not a question for the railway commissioners, because the parties would have their remedy in the courts. If the railway charges were excessive they could go into the county court or superior court, and recover

the surplus; or if such charges were only threatened, the parties could go into the courts and obtain an injunction.

When the case came before the railway commissioners there was obviously a disinclination on their part to recognize *Brown's Case*, L. R., 7 Q. B. D. 182, 2 Am. & Eng. R. Cas. 617, and they seem to have struggled to escape from the effect of it. The only question on the replication was the issue of excessive charges, and the commissioners gave the go-by to that; and it would puzzle anybody to ascertain from their decision whether they proceeded upon the first or on the second part of the 2nd section, because at one time they base their decision upon "facilities," at another time they base it upon "prejudice and disadvantage." Then they came to a conclusion, which in substance says, We do not decide upon the pleadings as they originally stood; but we decide upon the addition or rider to the pleadings. [The learned judge read it.]

But before I examine the judgment of the railway commissioners, let me see what is the real meaning of the 2nd section according to my humble judgment. I dismiss the third part, because the question of continuous lines does not arise at all. The first is the question of facilities. "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles." What is the meaning of "facilities"? It is clear that the word has no reference to excessive charges at all, but is used with reference to the convenience to be afforded in receiving and forwarding and delivering traffic, and so on, and the return of carriages; and that that is the right view appears from the judgment of BRETT, L. J., in *South Eastern R. Co. v. Railway Commissioners*, L. R., 6 Q. B. D. 586, at p. 600, when speaking of facilities, he said: "Their jurisdiction"—that is the railway commissioners' jurisdiction—"was further confined to this, that they could only properly deal with matters which might facilitate or impede the receiving, forwarding, or delivering of passengers or goods upon or from the existing railways or stations; they had no jurisdiction to entertain or deal with matters otherwise affecting passengers and goods." And in *Great Western R. Co. v. Railway Commissioners*, L. R., 7 Q. B. D. 182, at p. 196, 2 Am. & Eng. R. Cas. 617, COTTON, L. J., said: "Now, what I think comes within those words 'afford all reasonable facilities,' is the providing proper accommoda-

Reasonable
facilities.

tion in the stations and in the carriages for the receiving and forwarding passengers, and for getting them in and out of their carriages and the like. The mere fact that the charge is beyond that which parliament has sanctioned is not, in my opinion, a refusal to afford reasonable facilities. It may be the charges are so excessive," and so on. Those two authorities show that upon a question of excessive charges the authority of the railway commissioners on this portion of the Act—namely, as to the reasonable facilities—cannot be imported. That being gone, now let me see what is the only portion of the Act upon which they can act. That is the second: "And no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever." Nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Those words, "undue or unreasonable preference or advantage," and "prejudice or disadvantage," must, as it appears to me, mean a preference or a prejudice with reference to competing parties—an inequality, an unfairness, with reference to others, or a prejudice to other works and cannot mean that because there are excessive charges a prejudice arise to the applicants, for that is all that remains. All that the applicants can say here is—you charge us too much, but we dare not say that, because *Brown's Case*, L. R. 7 Q. B. D. 182, 2 Am. & Eng. R. Cas. 617, is decisive; therefore we will say you prejudice us because you charge us too much. Then they try to avail themselves of a very refined distinction, saying that in effect the overcharge is a refusal to carry, and therefore they are prejudiced—I will deal with that presently—and they try to do so in consequence of some *dicta* of BRETT and COTTON, L. JJ., in *Brown's Case*, L. R. 7 Q. B. D. 182, 2 Am. & Eng. R. Cas. 617, but I fail to see anything in those *dicta* to support that proposition. BRETT, L. J., says: "If there were a statement in the complaint that the overcharge was done with the intent to stop the running of a train or prevent a certain number of trains going, as at present advised I should think it was a matter within the jurisdiction of the railway commissioners" (at p. 196). I should myself doubt whether it was so. If, however, this had been a decision of the Lord Justices, I should have felt bound by it; but it is not, it is *obiter dictum*. To the same effect is a passage to be found in COTTON, L. J.'s, judgment. But that is a very different thing to anything that has been found here. I dare say if the railway commissioners had had their attention called to that, they might just as

well have arrived at the conclusion that the alleged overcharge was done with intent, as at the conclusion they have arrived at—namely, that it was done to prejudice.

I look at the judgment of the railway commissioners. Sir Frederick Peel left the question of law to the legal commissioner, now Sir Alexander Miller. That learned commissioner said: "In this case the presence of those allegations upon the absence of which the judges relied in that case" (that is referring to Brown's Case), "is sufficiently alleged. It appears that the applicants not only remonstrated against the charges as excessive in themselves, but as calculated to injure their business, that they formally announced in writing their intention not to pay more than the legal charges, and that thereupon the companies told them that unless that letter was withdrawn, they would not receive or carry the traffic." That certainly is contrary to the evidence; there is nothing in the evidence to say that it was calculated to injure their business, and so on. "This, in our opinion, amounted to a distinct tender by the applicants, and refusal by the company, of the sums alleged by the former to be the proper amounts." I do not think it does. He referred to two letters, and those two letters when read will not support this suggestion. "Of course, in considering the question of jurisdiction, we must assume the allegations to be true. Now, we are clearly of opinion, and the observations of the judges in Brown's Case, L. R. 7 Q. B. D. 182; 2 Am. & Eng. R. Cas. 617, serve to point to the same conclusion, that a refusal to receive and carry traffic except upon terms which the company are not warranted in exacting, is a denial of reasonable facilities within the meaning of the Act. And is also, when the sender of the traffic is thereby injured or inconvenienced in the conduct of his business, an undue prejudice and disadvantage to such sender." How does he make that out? No doubt if the railway companies require certain charges which are more than legitimate charges, and the sender refuses to pay them, he may be prejudiced by that; and so was Brown. "And from the character of this prejudice there is an obvious distinction between passenger and goods traffic. It may very well be that as to the former all that is required in the way of facilities is that proper carriages should be provided, and trains despatched at convenient times, and at reasonable rates of speed, because, as to all other matters, the passenger can help himself"—I do not understand that exactly, because passengers and goods are placed on the same footing—"but in the case of goods all that a sender can do is to deliver or offer the traffic to a company, and if they refuse to receive it, or, receiving, duly to forward it, he is as completely denied rea-

sonable facilities for its transmission as if the company had wilfully neglected to provide the physical appliances necessary for its business." Now has the learned commissioner decided upon the ground of reasonable facilities, or has he decided upon the ground of advantage or disadvantage, preference or prejudice. It is impossible to tell. I look first, therefore, to see what is the order that is drawn up. The order recites that terminal charges are disclaimed, and then that the applicants obtained leave to amend their application; and then the amendment is stated: "Whereby the applicants alleged that they and their traffic were subject to undue and unreasonable prejudice and disadvantage, and prayed for an injunction restraining the respondents from continuing to subject their traffic to such undue prejudice and disadvantage." Then the commissioners "Find and determine that except as to iron ore, the said railway companies do not subject the applicants or their traffic to any undue or unreasonable prejudice or disadvantage. And as to the iron ore we find that the said railway companies have refused to carry such traffic for the applicants to their works at Distington, except on the payment by the said applicants to the said railway companies for the conveyance of such traffic, of rates or charges in excess of the maximum rates which the said railway companies respectively are authorized to charge for the conveyance of such traffic"—that is Brown's Case, L. R. 7 Q. B. D. 182, 6 Am. & Eng. R. Cas. 617—"and have threatened to refuse such traffic for conveyance on their railways except upon prepayment of such excessive and illegal charges." What is really the meaning of that except that the railway companies have made excessive charges? That may be the case, but that is all that it amounts to. Then it is said that because those excessive charges are claimed there is an undue prejudice or an undue disadvantage to the applicants. "And we order and enjoin the said railway companies, and each of them respectively, to desist from subjecting the said applicants to such undue and unreasonable prejudice and disadvantage as aforesaid." I must come to the conclusion that the railway commissioners, finding they could not base their judgment upon the question of facilities, have set up this second part of the case—the preference or advantage, prejudice or disadvantage; and, for the purpose of giving themselves jurisdiction, have found that the excessive charges are a prejudice and disadvantage. That is the meaning of it. No court can give itself power. It cannot give itself jurisdiction by a finding which is not a proper finding; and in this case it appears to me that the whole substance of the application of the Distington Iron Company was a last resource.

Their first complaint was of terminal charges; when those were explained they were put out of court; and when, to recover themselves, they based their whole case on excessive charges, they were met by *Brown's Case*, L. R. 7 Q. B. D. 182; 2 Am. & Eng. R. Cas. 617, and tried to get rid of that by urging that there was a letter written which might have had the effect of preventing people sending goods by the railway, and therefore there was a prejudice or disadvantage. It is, in substance, saying there is a prejudice or disadvantage from the excessive charges. This is the real meaning and the real finding. That is bad, being directly opposed to *Brown's Case*, L. R. 7 Q. B. D. 182; 2 Am. & Eng. R. Cas. 617; and I am therefore of opinion that this prohibition must go, and go on the ground that the railway commissioners had no jurisdiction to entertain this question, because the *Distington Iron Company* have their ample remedy in the courts of justice.

MANISTY, J.—I am also of opinion that these rules must be made absolute. The question is simple, whether or not the railway commissioners had the power to make the order which they did make on August 11, 1888. Jurisdiction of railway commissioners. No doubt there had been amendments and variations of the complaint, but in the result it came to one simple question, whether or not the alleged overcharge by the railway companies, not upon one individual, but upon all who were using that part of the line, was within the act of 17 and 18 Vict. chap. 31—whether or not, if a railway company make an alleged excessive charge, that is a question to be tried in the Queen's Bench Division, or perhaps in the chancery division, of the high court of justice. It is a question of law, coupled, no doubt, with fact, but the fact is simply that the railway company has sought to charge more than the maximum rate allowed. All the rest, in this case, is out of the question. No doubt Sir Frederick Peel went into a number of questions, but he left the law to the learned commissioner, now Sir Alexander Miller. He says: "We are clearly of opinion, and the observations of the judges in *Brown's Case* serve to point to the same conclusion, that a refusal to receive and carry traffic except upon terms that the company are not warranted in exacting is"—what?—"a denial of reasonable facilities within the meaning of the act, and is also, when the sender of the traffic is thereby injured or inconvenienced in the conduct of his business, an undue prejudice and disadvantage to such sender."

That is the ground of the decision, and the order made upon it is, "We find that the railway companies have refused to carry, except on the payment by the applicants to the rail-

way companies of rates and charges in excess of the maximum rates which they are authorized to charge, and that the railway companies thereby subject the applicants to undue and unreasonable prejudice and disadvantage." There is not a word there about facilities. "And we order and enjoin the said railway companies, and each of them respectively, to desist from subjecting the applicants to"—what?—"to such undue and unreasonable prejudice and disadvantage." But, according to the authorities, that is not a question which they have a right to try. This is a question to be tried in the ordinary way, by the ordinary tribunals. The mere charging of an alleged excess—the railway companies say it is not an excess, the applicants say it is—is a question which it has been decided over and over again is not the subject of an order by the railway commissioners. It may be of assistance in dealing with similar cases if we look at the way in which the court of common pleas dealt with this sort of case after the act passed. There the law was clearly defined, and not only defined, but it was held by learned judges that such a question of an excessive charge upon all who are sending on traffic on a railway is not within the jurisdiction of the railway commissioners—it was not within the jurisdiction of the court of common pleas, and not being within the jurisdiction of the court of common pleas, it cannot be within the jurisdiction of the commissioners.

[The learned judge referred to *In re Caterham R. Co.*, 1 C. B. (N. S.) 410; *Ransome and Geard v. Eastern Counties R. Co.*, 1 C. B. (N. S.) 437; *In re Harris and Cockermouth R. Co.*, 3 C. B. (N. S.) 693.]

Then there is the opinion of the late COCKBURN, C. J., and BYLES, J., as to when the act applies. It had been stated in former cases, that if there was a remedy, otherwise than by going to the commissioners, you must resort to that remedy, and in *Bennett v. Manchester, Sheffield & Lincolnshire R. Co.*, 6 C. B. (N. S.) 707, at p. 714, COCKBURN, C. J., says: "Why not proceed by the remedies you had before the passing of Mr. Cardwell's act? I cannot think the statute was intended to apply where a remedy before existed. I can refer to several cases in which he made the same observations. Then BYLES, J., said this act "refers to preferences given to one person or class of persons over another in the traffic along the same railway or canal," (at p. 715). It had no reference, therefore, to one navigation and another, or two different railways. WILLES, J., always held the same opinion, and I would refer to cases in which he said that if an indictment could lie or an action could be maintained that concludes the question, and it is not a case within the jurisdiction of the

railway commissioners, for this reason, that railways and canals had given rise to a new state of things, which required new remedies. Many things in the shape of preference and undue advantage, and so on, were not the subject of any proceeding, either criminal or civil, and in order to meet those cases, powers were given to the railway commissioners to arrange as to traffic and as to giving facilities for traffic, and as to preventing undue prejudice, and undue favor to different parties. The object of the act was to provide for cases in which there was no remedy; and if the railway commissioners keep that in view, as I dare say they will in future, there will be no question.

The first question, therefore, always is: Is this a case in which you can bring your action? If it is, bring your action. The question of excessive charge is the subject of an action; *Brown's Case*, L. R. 7 Q. B. D. 182, 2 Am. & Eng. R. Cas. 617, is precise upon it, and exactly in point. Then there was *Pryce v. Monmouthshire Canal & R. Co.*, L. R. 4 App. Cas. 197, which is a very important case, because it involved a question of charging what was said to be an excess, and also a charge for stopping and a charge for terminals. Nineteen actions were brought, and they were consolidated and a case stated. That case came before the court, and went to the exchequer chamber, and to the house of lords, and all these questions of excessive charges, stoppage, and terminals were treated as matters to be dealt with in the ordinary way by action, and the house of lords held that a charge for stoppage was legal and a terminal. I only mention it as shewing there is no doubt that all these questions are questions to be tried in the ordinary courts, and, if they are, in my humble opinion they are not within the jurisdiction of the railway commissioners. Rules absolute.

Railway and Canal Commission—Jurisdiction—"Any Person Interested"—Dividing Rates in Rate Books.—By the Regulation of Railways Act, 1873 (36 & 37 Vict. chap. 45), § 14, "Every railway company and canal company shall keep at each of their stations and wharves a book or books shewing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged. The commissioners may from time to time on the application of any person interested make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses." *Semble*, that the expression "person interested" in § 14 is not limited to persons paying the rates which are the subject of the ap-

plication. *Semble*, (per WILLS, J., and Mr. Commissioner Price), that the expression "person interested" in the section includes any person who makes out by proper evidence that the rates which he seeks to have distinguished are really and substantially competitive rates with his own, and (per Commissioner Sir F. Peel) that it includes "all persons who have a *bona fide* interest in knowing how the particular rates which are the subject of their application are made up." *Semble*, that the Court has power under the section to require a railway company to distinguish rates in its rate-books in cases in which the company books traffic to stations which are not upon its own line. *Pelsall Coal & Iron Co. v. London & N. W. R. Co.*, L. R. 23 Q. B. Div. 536.

FRIEDLANDER

v.

TEXAS & PACIFIC R. Co.

(130 U. S. 416.)

Bill of Lading—Liability of Company for Fraudulent Issue.—If the station agent of a railroad company fraudulently issues a bill of lading for goods not placed in his possession, and delivers it to a person acting in collusion with him, the railroad company is not liable to an innocent indorsee who acquires the bill of lading for value and without notice.

ERROR to the Circuit Court of the United States for the Eastern District of Texas.

Friedlander & Co. brought suit in the District Court of Texas, in and for the county of Galveston, against the Texas and Pacific Railway Company, to recover for the non-delivery of certain cotton named in an alleged bill of lading hereinafter described, of which they claimed to be assignees for value, their petition after counting upon said bill of lading, thus continuing:

"That the said defendant, fraudulently contriving to avoid its liability to these plaintiffs, pretends and alleges that the said cotton was not so delivered as in and by said bill of lading is recited and acknowledged, but that the said bill of lading was executed without the receipt by its said agent of any of said cotton, all of which said pretences on the part of the defendant, plaintiffs allege are untrue; but they say that even if it be true that no cotton was delivered to said defendant as in and by said bill of lading is recited and acknowledged, yet is the defendant estopped from setting up that fact in defence of

plaintiffs' cause of action upon said bill of lading, because these plaintiffs say that the said bill of lading was executed in form negotiable and transferable by indorsement under the usage and customs of merchants, and that these plaintiffs, relying upon the validity of said bill of lading in all respects and upon the facts therein stated, that said cotton had been delivered to said defendant as aforesaid, and that defendant had contracted to carry and deliver said cotton as aforesaid, advanced to the said Joseph Lahnstein and paid out upon his order and at his request and in consideration of his said transfer of said bill of lading to these plaintiffs the sum of eight thousand dollars on, to wit, the 10th day of November, 1883, and that said payment was made and advanced upon the faith of the recitals and effect of said bill of lading as a contract to deliver the cotton therein mentioned as aforesaid, and that if the said cotton was never received by defendant, yet ought it to be held to the terms of the said bill of lading for the indemnification of these plaintiffs for said payment, with interest thereon from the date thereof, because of the fraud practised by the said agent upon these plaintiffs in the issuance of said bill of lading in the ordinary form and manner wherein he was authorized by the defendant to act, and defendants are estopped to deny that said cotton was received as against the claims of these plaintiffs for damages on account of defendant's failure to comply with said bill of lading to the extent of eight thousand dollars, with interest thereon, at the rate of 8 per cent. per annum, from the date of payment thereof as aforesaid; and if it be true, as alleged, that defendant received said cotton in said bill of lading mentioned, then plaintiff's claim of defendant the full value thereof, to wit, the sum of fifteen thousand dollars, with interest thereon from and after the 6th day of December, 1883, when and before which time defendant should have delivered said cotton under said bill of lading, according to the true intent and meaning thereof."

Defendant demurred, and also answered, denying "all and singular the allegations in the petition contained." The case was subsequently removed to the circuit court of the United States for the eastern district of Texas, whereupon by leave the defendant amended its answer by adding these further averments:

"That one E. D. Easton, on the 6th of November, 1883, was the station agent of defendant at Sherman station, in Grayson county, Texas, on the eastern division of defendant's line in Texas, and that as such agent he was authorized to receive cotton and other freight for transportation and to execute bills of lading for such cotton and other freight by him received for the purpose of transportation by defendant.

"That on the said 6th day of November, 1883, the said Easton, combining and confederating with one Joseph Lahnstein, did fraudulently and collusively sign a certain bill of lading purporting to be his act as agent of defendant whereby he falsely represented that defendant had received from the said Joseph Lahnstein two hundred bales of cotton in apparent good order, to be transported from Sherman to New Orleans, La., and did deliver the said false bill of lading to the said Joseph Lahnstein; and defendant says that in point of fact the said bill of lading was executed by the said Easton fraudulently and collusively with the said Lahnstein without receiving any cotton for transportation, such as was represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton; that the said pretended bill of lading was the one that is set out in the petitions of the plaintiffs, and was false, fraudulent and fictitious, and was not executed by defendant nor by its authority, and that the said Easton only had authority as agent aforesaid to execute and deliver bills of lading for freights actually received by him for transportation."

The cause was submitted to the court for trial, a jury being waived, upon the following agreed statement of facts:

"1st. On November 16th, 1883, at Sherman station, in Grayson county, Texas, on the eastern division of the Texas and Pacific Railway Company, E. D. Easton, agent for the defendant at said station, executed as such agent a bill of lading, of which a copy is hereinafter given, and delivered the same to Joseph Lahnstein, the person named in said bill of lading.

"2nd. That said Easton was at the time and place aforesaid the regularly authorized agent of the defendant for the purpose of receiving for shipment cotton and other freight for transportation by defendant over and along its line from Sherman station aforesaid, and that said bill of lading was in the usual form and made out upon the usual printed blanks in use by said defendant at said station, and that said Easton was authorized by said defendant to execute bills of lading for cotton and other freight by him received for the purpose of transportation by the defendant.

"3rd. That the said Joseph Lahnstein indorsed said bill of lading by writing his name across the back thereof and drew a draft on the plaintiffs in this cause on or about November 6th, 1883 (of which draft a copy is hereinafter given), for the sum of eight thousand dollars, payable at sight to the order of Oliver & Griggs, and attached said draft to said bill of lading so endorsed, and on or about November 6th, 1883, forwarded the same through said Oliver & Griggs for presenta-

tion to and payment by the plaintiffs in this cause; that in due course of business Oliver & Griggs forwarded said draft with bill of lading attached, to New Orleans, where the same was presented to and paid by plaintiffs on or about November 10th, 1883.

"4th. That in paying said draft said plaintiffs acted in good faith and in the usual course of their business as commission merchants making advances upon shipments of cotton to them for sale, and without any knowledge of any fraud or misrepresentation connected with said bill of lading and draft, and with the full and honest belief that said bill of lading and draft were honestly and in good faith executed, and that the cotton mentioned in said bill of lading had been in fact received by said defendant as represented in said bill of lading.

"5th. That plaintiffs had previously paid one or more drafts upon similar bills of lading, signed by the said Easton as agent aforesaid, for cotton shipped them by said Joseph Lahnstein, for sale by plaintiffs as commission merchants for account of said Joseph Lahnstein, and that the cotton so previously advanced upon was received by plaintiffs in the due course of transportation, pursuant to the terms of the bills of lading upon which they made advances respectively, and the bill of lading of November 6th, 1883, was the first received by plaintiffs from said Lahnstein and not fulfilled by defendant.

"6th. That, in point of fact, said bill of lading of November 6th, 1883, was executed by said E. D. Easton fraudulently and by collusion with said Lahnstein and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton; that said Easton and said Lahnstein had fraudulently combined in one other case, whereby said Easton signed and delivered to the said Lahnstein a similar bill of lading for three hundred bales of cotton which had not been received, and which the said Easton had no expectation of receiving, the latter named bill of lading having been given early in November, 1883, but that plaintiffs in this suit had no knowledge whatever of the facts stated in this (sixth) clause until after they had in good faith paid and advanced upon the bill of lading sued on and the draft thereto attached, to them presented as aforesaid, the sum of \$8,000, as hereinbefore stated.

"7th. That the cotton mentioned in said bill of lading, (of November 6th, 1883), had the same been actually received by defendant and forwarded to plaintiffs, would have been worth largely more than the amount so advanced by said plaintiffs as aforesaid—that is to say, would have been worth about \$10,000, and that, except that the cotton was not received nor

expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary and in the usual course of trade, and in accordance with the usage and customs of merchants and shippers and receivers of cotton.

"8th. That on said November 6th, 1883, and long prior thereto and ever since, the headquarters and main offices of defendant were and have been connected by railroad and telegraph communication with all stations on defendant's railroad and with Sherman station aforesaid, among others.

"9th. That the defendant is a corporation created and existing and domiciled as alleged in the petition.

"10th. That on November 10th, 1883, said Joseph mentioned above was insolvent, and that he has been insolvent ever since and is so now."

Then follows bill of lading, indorsed by Lahnstein and with draft on Friedlander & Co. for \$8,000 attached, acknowledging the receipt from Joseph Lahnstein of "two hundred bales of cotton in apparent good order, marked and numbered as below to be transported from Sherman to New Orleans, La., and delivered to the consignees or a connecting common carrier," and proceeding in the usual form, Lahnstein being named as consignee, and directions given, "Notify J. Friedlander & Co., New Orleans, La." The Circuit Court found for the defendant, and judgment was rendered accordingly, and writ of error thereupon brought to this court.

Upon the argument certain parts of the statutes of the State of Texas were cited, with especial reference to the provision as to common carriers, "that the trip or voyage shall be considered as having commenced from the time of the signing of bill of lading." Title 13, Carriers, chap. 1, art. 277; art. 280; art. 283, [Act February 4, 1860]; Title 84, Railroads, chap. 10, Art. 4258 b, § 8, [Approved, April 10, 1883, General Laws, Texas, 1883, p. 69]. Sayles' Texas Civil Statutes, 1888, Vol. I, pp. 131, 134, 135; Vol. II, p. 450.

A. G. Safford for plaintiffs in error, cited.

Winslow F. Pierce and *J. F. Dillon* for defendant in error.

FULLER, C. J.—The agreed statement of facts sets forth "that, in point of fact, said bill of lading of November 6, 1883, was executed by said E. D. Easton, fraudulently and by collusion with said Lahnstein and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of said Easton of receiving any such cotton;" and it is further said that Easton and Lahnstein had fraudulently combined in another case, whereby Easton signed and delivered

Case stated.

to Lahnstein a similar bill of lading for cotton "which had not been received, and which the said Easton had no expectation of receiving;" and also "that, except that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary." In view of this language, the words "for transportation, such as is represented in said bill of lading" cannot be held to operate as a limitation. The inference to be drawn from the statement is that no cotton whatever was delivered for transportation to the agent at Sherman station. The question arises, then, whether the agent of a railroad company at one of its stations can bind the company by the execution of a bill of lading for goods not actually placed in his possession, and its delivery to a person fraudulently pretending in collusion with such agent that he had shipped such goods, in favor of a party without notice, with whom, in furtherance of the fraud, the pretended shipper negotiates a draft, with the false bill of lading attached.

Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron or other articles of merchandise, in that they are symbols of ownership of the goods they cover. And as no sale of goods lost or stolen, though to a *bona fide* purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect, although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position ostensibly, as to estop him from asserting his right as against a purchase, who has been misled to his hurt by reason of such negligence. *Shaw v. Railroad Co.*, 101 U. S. 557, 563; *Pollard v. Vinton*, 105 U. S. 7, 8; *Gurney v. Behrend*, 3 El. & Bl. 622, 633, 634. It is true that while not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances; but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery. Such being the character of a bill of lading, can a recovery be had against a common carrier for goods never

Nature and
functions of
bills of lading.

actually in its possession for transportation, because one of its agents, having authority to sign bills of lading, by collusion with another person issues the document in the absence of any goods at all?

It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and, if he does so, his act does not bind the owner of the ship even in favor of an innocent purchaser. The *Freeman v. Buckingham*, 18 How. (U. S.) 182, 191; The *Lady Franklin*, 8 Wall. (U. S.) 325; *Pollard v. Vinton*, 105 U. S. 7. And this agrees with the rule laid down by the English courts. *Lickbarrow v. Mason*, 2 T. R. 77; *Grant v. Norway*, 10 C. B. 665; *Cox v. Bruce*, 18 Q. B. D. 147. "The receipt of the goods," said Mr. Justice MILLER, in *Pollard v. Vinton*, *supra*, "lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." "And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea," as was said by Mr. Justice MATTHEWS in *Iron Mountain R. Co. v. Knight*, 122 U. S. 79, 87, he adding also: "If Potter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of *The Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182, and *Pollard v. Vinton*, 105 U. S. 7."

It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became *particeps criminis* with the latter in the commission of the fraud upon Fried-

Authority of
master to
sign bill of
lading.

Liability of
carrier for
fraudulent
bill of lad-
ing.

lander & Co., and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment and shipper; nor is the action maintainable on the ground of tort. "The general rule," said WILLES, J., in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, 265, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." See, also, *Limpus v. London General Omnibus Co.*, 1 H. & C. 526. The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, cannot be made responsible. *British Mutual Banking Co. v. Charnwood Forest Railway Co.*, 18 Q. B. D. 714. The law can punish roguery, but cannot always protect a purchaser from loss, and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victim.

Under the Texas statutes the trip or voyage commences from the time of the signing of the bill of lading issued upon the delivery of the goods, and thereunder the carrier cannot avoid his liability as such, even though the goods are not actually on their passage at the time of a loss, but these provisions do not affect the result here.

We cannot distinguish the case in hand from those heretofore decided by this court, and in consonance with the conclusions therein announced this judgment must be affirmed.

Liability of Railroad Company on Bills of Lading Fraudulently Issued by its Agents.—See *Bank of Batavia v. New York, L. E. & W. R. Co.*, (N. Y.), 32 Am. & Eng. R. Cas. 497; *Brooke v. New York, L. E. & W. R. Co.*, (Pa.) 21 *lb.* 64, note 68.

FOREPAUGH

v

DELAWARE, LACKAWANNA & WESTERN R. CO.

(Pennsylvania Supreme Court, October 7, 1889.)

Carriage of Goods—Conflict of Laws—Lex Loci Contractus.—A contract for the carriage of goods which contains a stipulation releasing the carrier from liability for damages resulting from his negligence, will be enforced in an action in Pennsylvania according to the law of New York, if it was made, was to be performed, and the alleged breach occurred in, New York.

Same—Conflict of Laws—Liabilities Arising Out of the Law Merchant.—When a contract is governed by the *lex loci contractus* the Pennsylvania court will enforce it according to that law whether the rights arising thereunder are founded upon the law merchant as construed by the court where the contract was made, or are dependent upon statute.

WILLIAMS and STERRETT, JJ. dissenting.

ERROR to Court of Common Pleas, Philadelphia County.

Trespass on the case by Adam Forepaugh against the Delaware, Lackawanna & Western R. Co. to recover damages for injuries sustained by plaintiff's property while being transported over the defendant's railroad. Plaintiff brings error to review judgment for the defendant.

John A. Brown and John G. Johnson for plaintiff in error.

J. Bayard Henry, Lawrence Lewis, Jr., and Hampton L. Carson for defendant in error.

MITCHELL, J. Plaintiff, being the proprietor of a circus, made a special contract with defendant for the transportation of a number of his own cars, upon certain conditions and terms elaborately set out in writing, among which **Case stated.** was a stipulation that, in consideration that the service was to be performed "for much less than the ordinary, usual, and legal rates charged other parties for a like amount of transportation," the plaintiff released the defendant from all liability for or on account of loss, damage, or injury to any of the animals, property, or things thus transported, "although such loss, damage, or injury may be caused by the negligence of the [defendant,] its agents or employes." Damage having occurred by the negligence of defendant, plaintiff brought this suit, and the sole question before us is whether it can be maintained in the face of the stipulation above set forth.

The contract was made, was to be performed, and the alleged breach occurred, in New York. No possible element was wanting, therefore, to make it a New York contract. It is admitted that in New York the stipulation is valid, and this action could not be maintained. Validity of stipulation in New York.
Cragin v. New York Cent. R. Co., 51 N. Y. 61;
Mynard v. Syracuse B. & N. Y. R. Co., 71 N. Y. 180;
Wilson v. New York C. & H. R. Co., 97 N. Y. 87, 21 Am. & Eng. R. Cas. 184. Why, then, should plaintiff, by stepping across the boundary into Pennsylvania, acquire rights which he has not paid for, and his contract does not give him?

It is argued that the validity of this contract is a question of commercial law, and therefore the mere decisions of the New York courts are not binding; and in the absence of any statute in New York expressly authorizing such a contract, the courts of this state must follow their own views of the commercial as part of the general common law, though different views may be held as to such law by the courts of New York. This is the main argument of the plaintiff, and, as it is one which is frequently advanced, and affects a number of important questions, it is time to say plainly that it rests upon an utterly inadmissible and untenable basis. There is no such thing as a general commercial or general common law, separate from, and irrespective of, a particular state or government whose authority makes it law. Nature of commercial law.

Law is defined as a rule prescribed by the sovereign power.

By whom is a general commercial law prescribed, and what tribunal has authority or recognition to declare or enforce it, outside of the local jurisdiction of the government it represents?

Even the law of nations, the widest reaching of all, is a law only in name. It has but a moral sanction, and the only tribunal that undertakes to enforce it is the armed hand, the *ultima ratio regum*. The so-called commercial law is likewise a law only in name. Upon many questions arising in the business dealings of men, the laws of modern civilized states are substantially the same; and it is therefore common to say that such is the commercial law, but, except as a convenient phrase, such general law does not exist. There must be a state or government, of which every law can be predicated, and to whose authority it owes its existence as law. Without such sanction, it is not law at all; with such sanction, it is law without reference to its origin, or the concurrence of other states or people. Such sanction it is the prerogative of the courts of each state themselves to declare.

Their jurisdiction is final and exclusive, and in this respect there is no distinction between statute and common law.

It is universally conceded that, as to statutes, the decisions of the state courts are binding upon all other tribunals, yet such decisions have no higher sanction than those upon the common law ; for what the latter determine, equally

Common law
of different
states.

with the former, is the law of the particular state. The law of Pennsylvania consists of the constitution, treaties, and statutes of the United States, the constitution and statutes of this state, and the common law, not of any or all other countries, but of Pennsylvania. There is a common law of England, and a common law of Pennsylvania mainly founded thereon, but with certain differences ; and the only tribunal competent to pass authoritatively on such differences is a Pennsylvania court. To take a familiar illustration : In the United States the universal doctrine has always been that the English colonists brought with them, and made part of their laws, all the common law of England that was not unsuited to their new situation. No part of the common law of England is better settled than the doctrine of ancient lights. The court of chancery of New Jersey, in *Robeson v. Pittenger*, 2 N. J. Eq. 57, (1838), held that the same doctrine was part of the common law of New Jersey. The supreme court of Pennsylvania, on the other hand, starting with the same premises, and reasoning on the same principles but, proceeding cautiously from the dictum of ROGERS, J., in *Hoy v. Sterrett*, 2 Watts, (Pa.), 331, (1834), to the unanimous decision of the court in *Haverstick v. Sipe*, 33 Pa. St. 368, (1859), held that the doctrine of ancient lights by prescription was not part of the common law of Pennsylvania. No tribunals of any other state presume to question that the common law of New Jersey and the common law of Pennsylvania differ on this point. What is law in one state is not law in the other, not because it was or was not the common law of England, but because it is or is not the law of the respective states ; and, though it rests only on the decisions of the courts, it is none the less absolutely and indisputably the law, than if it had been made so by statute. I have purposely selected an illustration from the law relating to real estate, because, if I took one from the commercial law, it might seem like assuming the very question under discussion. But the example is none the less pertinent. The point is the force of judicial decisions on the common law, and the assumption that there is any tenable basis for holding them less binding upon such law than upon statutes. The so-called commercial law derives all its force from its adoption as part of the common law, and a decision

on the commercial law of a state stands upon precisely the same basis as a decision upon any other branch of the common law. The only ground upon which any foreign tribunal can question either is that it does not agree with the premises or the reasoning of the court. But the same ground would enable it to question a decision upon a statute because a different construction seemed to it nearer the true intent of the legislative language, and this, it is universally conceded, no foreign court can do. There is no difference in principle. The decisions of a state court, upon its common law and on its statutes, must stand unquestioned, because it is the only authority competent to decide; or they must be alike questionable by any tribunal which may choose to differ with its reasons or its conclusions.

It is not probable that the doctrine of such a distinction would ever have got a foothold in jurisprudence, and it would certainly have been long ago abandoned, had it not been for the unfortunate misstep that was made in the opinion in *Swift v. Tyson*, 16 Pet. (U. S.) 1. Rule adopted
by federal
courts. Since then the courts of the United States have persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it, in entire disregard of the law of the state where the question arose. It is argued now that, as to such questions, the state courts also have similar liberty. It would be sufficient answer to this argument that such a course, by reading into a contract a new duty not in contemplation of the parties, and not part of it by the law of the place where it is made, is, in principle and in practical effect, impairing the obligation of the contract, which even the sovereign power of a state is prohibited from doing. But we prefer to rest the matter on the broader ground that the doctrine itself is unsound. The best professional opinion has long regarded it as indefensible on principle, and is thus very recently summed up by the most learned of living jurists: "Questions growing out of contracts made and to be performed in a state are decided by the national court of last resort, not in accordance with the unwritten or customary law of the state where they originated, as expounded by its courts, but agreeably to some theoretic view of a general commercial law, which does not exist, and is not to be found in the books. The state courts, on the other hand, adhere to their own precedents, and do not consider themselves entitled to impair the obligation of contracts that have been made in reliance on the principles which they have laid down through a long series of years. The result is a conflict of jurisdiction which there are no means of allaying."

* * * Whether a recovery shall be had on a promissory

note which has been taken as collateral security for an antecedent debt against a maker from whom it was obtained by fraud, is thus made to turn in New York, Pennsylvania, and Ohio, not on any settled rule, but on the tribunal by which the cause is heard; and, if that is federal, the plaintiff will prevail; if it is local, the defendant. Such a result tends to discredit the law. * * * The enumeration might be carried further, but enough has, perhaps, been said to show that no uniform rule can be deduced from the decisions of the English and American courts under the commercial law, and that the certainty requisite to justice can be obtained only by following the local tribunals as regards the contracts made in each locality. The several states of this country are collectively one nation, but they are as self-governing in all that concerns their purely internal commerce as if the general government did not exist; and when the will of the people of New York or Pennsylvania is declared on such matters, through their representatives in the local legislatures, expressly or by long continued acquiescence in the rules enunciated by their judges, it cannot be set aside by congress short of an amendment of the constitution. Had the New York legislature declared that notes made and negotiated in that state should follow the rule laid down in *Coddington v. Bay*, [20 Johns. (N. Y.) 637,] the federal tribunals would have been bound to carry it into effect, notwithstanding any attempt of the national legislature to introduce a different principle; and it is inconceivable that the judicial department of the government can exercise a greater authority in this regard than the legislature." Hare, Const. Law, 1107, 1117, and see Lecture 51, *passim*.

We conclude, therefore, that the distinction between the binding effect of decisions on commercial law and on statutes is utterly untenable; that the law declared by state courts to govern on contracts made within their jurisdiction is conclusive everywhere; and the departure made by the United States courts is to be regretted, and certainly not to be followed. In entire accordance with this view are our own cases of *Brown v. Camden & A. R. Co.*, 83 Pa. St. 316, and *Brooke v. N. Y., L. E. & W. R. Co.*, 108 Pa. St. 530, 21 Am. & Eng. R. Cas. 64; and the decisions in *Ohio Knowlton v. Erie R. Co.*, 19 Ohio St. 260; in *Illinois: Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Milwaukee & St. P. R. Co. v. Smith*, 74 Ill. 197; in *Iowa: Talbott v. Merchant's Despatch Transportation Co.*, 41 Iowa, 247; *Robinson v. Merchant's Despatch Transportation Co.*, 45 Iowa, 470; in *Connecticut: Hale v. Navigation Co.*, 15 Conn. 539; in *Kansas:*

No distinction
between binding
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decisions on
statute and
on commercial
law.

Atchison, T. & S. F. R. Co. *v.* Moore, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243; in South Carolina: Bridger *v.* Asheville & S. R. Co., 27 S. C. 462; in Georgia: Atlanta & C. A. L. R. Co. *v.* Tanner, 68 Ga. 390; in Mississippi: McMaster *v.* Illinois Cent. R. Co., 65 Miss. 271; in Texas: Cantu *v.* Bennett, 39 Tex. 303; Ryan *v.* Missouri, K. & T. R. Co., 65 Tex. 13, 23 Am. & Eng. R. Cas. 703 and perhaps in other states. I will not notice them in detail further than to quote the terse and forcible summary made by SCOTT, J., in Knowlton *v.* Railway Co.: "As the contract was made within the jurisdiction of New York, and contemplated no action outside of that jurisdiction, it is clear that the question of its validity must be determined solely by the laws of New York. The rights and obligations of the parties to such a contract, and in respect to the manner of its execution, cannot be affected by the laws or policy of other states. If no cause of action arose to the plaintiff under his contract when the accident occurred, the transaction cannot be converted into a cause of action by the fact that the parties have subsequently come within the jurisdiction of Ohio." Holding, therefore, that the validity of this contract is to be determined by the law of New York, as decided by the courts of that state, is there any reason why the courts of this state should not enforce it? The general rule is that courts will enforce contracts valid by the law of the place where made, unless they are injurious to the interests of the state, or of its citizens. Story, *Conf. Laws*, §§ 38, 244. The injury may be indirect by offending against justice or morality, or by tending to subvert settled public policy, (2 Kent. Comm. 458; Greenwood *v.* Curtis, 6 Mass. 358; Bliss *v.* Bainard, 41 N. H. 256;) but this does not imply that courts will not sustain contracts that would not be valid if made within their jurisdiction, or will not enforce rights that could not be acquired there. Thus, for example, the courts of Pennsylvania have always enforced contracts for a higher rate of interest than would be valid under the laws of this state. Ralph *v.* Brown, 3 Watts & S. (Pa.), 395; Wood *v.* Kelso, 27 Pa. St. 243; Irvine *v.* Barrett, 2 Grant Cas. (Pa.), 73.

The contract in the present case does not directly affect the state or its citizens in any way. Nor is it in any way contrary to justice or morality. It may be doubted whether it is even so far contrary to the policy of the state that it would have been invalid if it had been made here. It has some exceptional features, which, it is argued, take it out of the ordinary rules governing the contracts of common carriers; and the case of Coup *v.* Wabash, St. L. & P. R. Co., 56 Mich. 111, 18 Am. & Eng. R. Cas. 542, is a strong authority

New York decisions not contrary to policy of state of Pennsylvania.

for that position. But without stopping to discuss that point, which our general view renders unnecessary, it is sufficient to say that, even if it would not have been valid if made here, its enforcement as a New York contract does not in any way derogate from the laws of Pennsylvania, or injure or affect the policy of the state, any more than would a foreign contract for what would be usurious interest here, and that, as already said, the courts have never hesitated to enforce.

The argument of duress may be briefly dismissed for want of any evidence in the case to sustain it. There is no evidence that defendant was unwilling to accept the ordinary and usual rates for the transportation of plaintiff's cars and property. If they had been offered by plaintiff and refused, there might have been some ground for the present argument, though, in view of the peculiar nature of the property, and the special facilities required, even that is far from clear. But in fact, plaintiff got a large reduction of rates, and part of the consideration for such reduction was the agreement that he should be his own insurer against loss by accident. There was nothing compulsory about such a contract, and plaintiff comes now with a very bad grace to assert a right that he expressly relinquished for a substantial consideration.

The learned court below was right in entering judgment for the defendant on the facts found in the special verdict. Judgment affirmed.

WILLIAMS, J., (*dissenting*).—I dissent from the judgment in this case, because I cannot agree that a well-settled rule of public policy of this commonwealth must give way to considerations of mere comity. The contract set up as a defense to this action is a release to a common carrier from liability for its own negligence. It is well settled in this state that such a release is against public policy. Comity does not require more of us than to give effect to the *lex loci contractus*, when not subversive of the public policy of our own state. This has been distinctly held by the court of appeals of New York, in which this release was executed, and in whose behalf comity is asked. I would follow the court of appeals, because comity can require no more of us in any given case than the courts of the place of the contract would yield to us for comity's sake, and because I believe the rule to rest on solid ground.

STERRETT, J., concurs in the foregoing dissent.

Conflict of Laws—Construction of Bills of Lading.—See *Liverpool & G. W. S. Co. v. Phenix Ins. Co.* (U. S.), 37 Am. & Eng. R. Cas. 681; *Ryan v. Missouri, K. & T. R. Co.* (Tex.), 23 *Id.* 703; *Brooke v. New York, L. E. & W. R. Co.* (Pa.), 21 *Id.* 64.

LOUISVILLE, EVANSVILLE & ST. LOUIS R. CO.

v.

WILSON *et al.*(119 *Ind.* 352.)

Carriage of Goods—Parol Testimony to Prove Agreement as to Freight.—If a bill of lading does not stipulate the price to be paid for the carriage of the goods, the law imports into it the agreement that the compensation shall be reasonable, and such as is customarily charged others for like service under like conditions, and parol testimony is not admissible to prove a verbal agreement as to the rate.

APPEAL from Superior Court, Vanderburgh County.

A. P. Humphrey and *Gilchrist & DeBruler* for appellants.

J. S. & C. Buchanan for appellees.

MITCHELL, J.—Wilson and Chambers, partners engaged in purchasing and shipping cross ties used in the construction and maintenance of railroads, sued the appellant railroad company to recover for alleged excessive freight charges paid upon 354 car loads of ties shipped over the defendant company's railroad. The plaintiffs allege that the railroad company entered into an agreement with them, whereby it became bound to receive and transport to points named cross ties at the rate of \$14 per car load; that, in pursuance of the agreement so entered into, the defendant company received and transported the number of car loads above mentioned, but that in disregard of the contract it collected \$2,700 in excess of the amount agreed upon from the consignees, and that the latter deducted the sum from the price paid the plaintiffs. This appeal is from a judgment in favor of the plaintiffs for the full amount claimed in their complaint. The questions for decision arise upon the ruling of the court in overruling the appellant's motion for a new trial. The evidence tends to show that the plaintiffs were engaged in transporting ties over the defendant's road during the year 1886, and that during that year the rate charged for freight was 7 cents a tie, or \$14 per car load. In the month of December, 1886, the company issued a circular notifying all

Facts.

persons engaged in shipping cross ties over its line that the rate on freight of that description would be the same as for soft lumber after January 1, 1887. It had formerly been less than the soft lumber rate. The plaintiffs received this notice, but they gave evidence tending to prove that, after receiving the notice, one of the plaintiffs had an interview with the general freight agent of the defendant's road, and that upon inquiry the agent said the notice was not intended to apply to the plaintiffs, but only to some other shippers of like freight, whose patronage was not desired, and that the cross ties of the plaintiffs would be shipped at the old rate of \$14 a car, notwithstanding the notice. It appeared that, under the arrangement thus claimed to have been made, 354 car loads of cross ties were shipped to various points, and that the company collected freight from the consignees at rates ranging from \$17.50 to \$24.50 per car load. The soft lumber rate over the defendant's road during the same period was about \$23 per car. It appears further, that as each lot was shipped bills of lading were delivered to the shipper by the company. The bills of lading for 168 cars contained an acknowledgement of the receipt of the number of ties on each car, and specified the weight, and stipulated that the ties were to be transported over the defendant's line of road to the company's freight station at Evansville, and there delivered to connecting lines on payment of freight and charges in par funds. The cars were assigned to the Chicago, Burlington & Quincy Railway Company, Aurora, Ill. The column in which the amount to be charged for freight might have been indicated was left blank. The bills of lading for 186 cars were in all respects similar to those above described, except that they contained a statement of the amount to be paid for freight, the amount inserted being that actually charged. These bills were received, as they were issued, by the plaintiffs, without objection.

It is to be observed that the complaint was framed, and that the action proceeded to judgment, upon the theory that the ties were shipped under an oral agreement, by the terms of which the railroad company bound itself to carry the plaintiff's freight at the rate of \$14 per car load. The action is to recover for overcharges made in disregard of this agreement. The proof, however, shows, without any contradiction whatever, that the shipments were made pursuant to written and printed bills of lading, signed by the company's agent, and delivered to the shipper before the transportation began in each instance. The question presented at the threshold, therefore is, was it competent for the plaintiffs, without alleging any fraud, concealment, or mistake, to recover upon an oral contract made prior to the issuing of the bills of lading,

which are supposed to set forth the terms and conditions upon which the goods were to be transported, or must the rights of the parties be determined by the express terms and legal import of these instruments?

A bill of lading is twofold in its character. It is a receipt specifying the quantity, character, and condition of the goods received, and it is also a contract by which the carrier agrees to transport the goods therein described to a place named, and there deliver them to a designated consignee, upon the terms and conditions specified in the instrument. *The Delaware*, 14 Wall. (U. S.), 579; *O'Brien v. Gilchrist*, 34 Me. 554; 2 Am. & Eng. Cyclop. Law, 228; *Chandler v. Sprague*, 38 Am. Dec. 405, and note.

Twofold nature of bill of lading.

So far as a bill of lading is in the nature of a receipt, or an acknowledgment of the quantity and condition of the goods delivered, it may, like any other receipt, be explained, varied, or even contradicted, but as a contract, expressing the terms and conditions upon which the property is to be transported, it is to be regarded as merging all prior and contemporaneous agreements of the parties, and, in the absence of fraud, concealment, or mistake, its terms or legal import, when free from ambiguity, cannot be explained nor added to by parol. *Snow v. Indiana B. & W. R. Co.*, 109 Ind. 422, 28 Am. & Eng. R. Cas. 77, and cases cited. Such a contract is to be construed, like all other written contracts, according to the legal import of its terms. It becomes the sole evidence of the undertaking, and all antecedent agreements are extinguished by the writing. *Lawson*, Carr. § 113; *Collender v. Dinsmore*, 55 N. Y. 200; *Southern Express Co. v. Dickson*, 94 U. S. 549; *Planters Nat. Bank v. Adams Express Co.*, 93 U. S. 174; *Kirkland v. Dinsmore*, 62 N. Y. 171. Thus, in *Snow v. Indiana B. & W. R. Co.*, *supra*, the shipper of a car load of horses, who had received a bill of lading in which no route was designated by which the car was to be forwarded after leaving the initial carrier's line, offered to prove that a particular line had been agreed upon. It was held that the silence of the bill of lading, in the respect mentioned, was the same in legal effect as if a provision had been inserted therein authorizing the first carrier to select at its discretion any customary or usual route, which was regarded as safe and responsible, by which to forward the car, and that the provision thus imported into the bill of lading was no more subject to be assailed by parol than were any of the express terms of the contract. The cases which affirm this principle are very numerous. They proceed upon the theory that in the absence of express stipulation certain terms are annexed to every contract by legal implica-

Admissibility of parol evidence.

tion, and that stipulations thus imported into a contract become as effectually a part of the written agreement as though they were expressed therein in terms. *Long v. Straus*, 107 Ind. 94; *Hudson Canal Co. v. Penn. Coal Co.*, 8 Wall. (U. S.), 276-288; *Hill v. Syracuse, B. & N. Y. R. Co.*, 73 N. Y. 351. Thus where, in a written contract for the sale of property, no time is fixed for the payment of the purchase price, the law implies that the price is to be paid upon the delivery or transfer of the property, and the purchaser, without alleging fraud or mistake, would not be heard to prove by parol that the sale was made on credit. An apparent exception to the general rule occurs where proof of an agreement collateral to that contained in the bill of lading is offered. *Baltimore & Phila. Steamboat Co. v. Brown*, 54 Pa. St. 77; *Lawson, Carr.* § 115.

As we have seen, all the bills of lading contain a stipulation to the effect that the cross-ties are to be transported over the defendant's road, and that they are to be delivered as therein specified, upon payment of freight and charges in par funds. In some of them the amount to be paid is not fixed, while in others the charges actually collected were inserted in the bills of lading before they were delivered to the plaintiffs, and before the ties were transported. Surely there can be no ground of recovery where the amount actually collected was stipulated in the bills of lading beforehand, nor was it competent to give evidence of an oral agreement concerning the amount of freight to be paid with a view of establishing a right of recovery in respect to those bills of lading in which the amount was not fixed in express terms. The bills of lading must be regarded either as complete contracts, into which all the oral negotiations of the parties are merged, or they are entirely without force or effect as evidence of the terms and conditions upon which the goods were to be transported. While it is true the contract of a common carrier to transport goods is equally binding whether it be by parol or in writing, (*Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 16 Am. & Eng. R. Cas. 132), no good reason can be suggested in support of a rule which should declare that part of the contract might be in writing, and part, covering the same subject-matter, by parol. Either the bill of lading must be regarded as the sole repository of the agreement of the parties, in respect to the terms upon which the shipments were made, or it must be regarded as a receipt, and nothing more. As a contract, a bill of lading, like other written contracts, is presumed, in the absence of imposition or mistake, to embody the entire agreement of the parties. *Lawson, Carr.* §§ 112, 113; *Long v. New York Central R. Co.*, 50 N. Y. 76.

The bills of lading involved in the present case cover every subject of the contract of shipment, except that some of them are silent, as to the amount of freight to be paid. If in the absence of an agreement, the law supplies this term by implication, then the writings constitute complete contracts, and parol evidence is inadmissible to vary, control, or contradict the terms therein expressed, or those which the law certainly implies. *Indianapolis and C. R. Co. v. Remmy*, 13 Ind. 518; *Jeffersonville M. & I. R. Co. v. Worland*, 509 Ind. 338; *Pemberton Co. v. New York Cent. R. Co.*, 104 Mass. 144. The law makes it the duty of every common carrier to receive and carry all goods seasonably offered for transportation, and authorizes a reasonable reward to be charged for the service. The amount to be paid is in a measure subject to the agreement of the parties, but, when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, which is to be ascertained by the amount commonly or customarily paid for other like services. *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623; *Ang. Carr.*, § 392; *Lawson, Carr.* § 125. Whether a railroad company may in the absence of legislation, agree upon different rates of compensation, for similiar services for different persons, is a question we need not consider in the present case. *Fitchburg R. Co. v. Gage*, 12 Gray (Mass.), 393; *Spofford v. Boston & M. R. Co.*, 128 Mass. 326; *Ragan v. Aiken*, 9 Lea (Tenn.), 609, 9 Am. & Eng. R. Cas. 201.

Without regard to the rights of the shipper and carrier, as they may be under special contracts, the agreement which the law imports into every bill of lading which does not stipulate the price to be paid for the service is that the compensation shall be reasonable, and such as is customarily charged others for like service, under like conditions. *Railway Co. v. Evershed*, L. R. 3 App. Cas. 1029. This is the contract which the law makes for the parties, and which is imported into every bill of lading which contains no express stipulation covering the subject of the amount to be paid. The conclusion which follows is that, in the absence of an express agreement in respect to the amount to be charged, written in the bills of lading, the law implies that the amount shall be the reasonable or customary charge. It is neither averred nor proved that the amount collected was unreasonable, or more than the usual or customary charge for like services. The plaintiffs were therefore not entitled to recover. The judgment is reversed, with costs, with directions to the court to sustain the motion for a new trial.

Nature of Bills of Lading.—A bill of lading in the usual form has a two

fold character; it is a receipt for the goods shipped and a promise or contract to transport and deliver the same as therein stipulated. *McTyer v. Steel*, 26 Ala. 487; *Wayland v. Mosely*, 5 Ala. 430; *O'Brien v. Gilchrist*, 34 Me. 554; *Steamboat Missouri v. Webb*, 9 Mo. 193; *Graves v. Harwood*, 9 Barb. (N. Y.), 477; *Wolfe v. Myers*, 3 Sandf. (N. Y.), 7; *Babcock v. May*, 4 Ohio 334; *Wood v. Perry*, *Wright* (Ohio), 240; *Pollard v. Vinton*, 105 U. S. 7; *The Delaware*, 14 Wall. (U. S.), 579. But its primary office and purpose is to express the terms of the contract between the shipper and the ship-owner, although by mercantile usage, it is also the symbol of the right of property in the goods. *Glyn Mills & Co. v. East & W. India Dock Co.*, L. R. 7 App. Cas. 591, 596.

Bills of Lading as Contracts—Evidence to Explain or Contradict Terms.—

In its character of a contract for the transportation of goods, parol evidence is not admissible to explain a bill of lading. *Goodrich v. Norris* Abb. Adm. 196; *Dixon v. Columbus & I. R. Co.*, 4 Biss (U. S.), 137; *The Joseph Grant*, 1 Biss. (U. S.), 193; *Backus v. Schooner Marengo*, 6 McLean (U. S.), 499; *The Delaware*, 14 Wall. (U. S.), 579; *Cox v. Peterson*, 30 Ala. 608; *McTyer v. Steele*, 26 Ala. 487; *White v. Ashton*, 51 N. Y. 280; aff'g 25 Barb. (N. Y.), 16; *Ellis v. Willard*, 9 N. Y. 529; *Wolfe v. Myers*, 3 Sandf. (N. Y.), 7; *Creery v. Holly*, 14 Wend. (N. Y.), 26; *Cafiero v. Welsh*, 8 Phila. (Pa.), 130; 1 Leg. Gaz. Rep. 121; *Chartered Mercantile Bank of India v. Netherlands India Steam Nav. Co.*, L. R. 10 Q. B. Div. 521, 528; *Fraser v. Telegraph Const. Co.*, L. R. 7 Q. B. 566, 571. It conclusively establishes the employment of the carrier and the essential stipulations of the contract. *Cafiero v. Walsh*, 8 Phila. (Pa.), 130; 1 Leg. Gaz. Rep. 121.

Where a bill of lading has been executed in duplicate, parol proof of its contents is incompetent until after satisfactory excuse for the non-production of both parts of the instrument itself. Hence, where a duplicate part of a bill of lading was attached to a draft drawn on plaintiff, and paid by him, there was a presumption that it was in his possession or under his control. And although loss of the other duplicate was proved, plaintiff could not prove its contents by parol until after excusing the non-production of the part attached to the draft; and the fact that his residence was outside of the jurisdiction of the court made no difference. *Alabama Great Southern R. Co. v. Mount Vernon Co.* (Ala.), 35 Am. & Eng. R. Cas. 657.

Same—Ambiguities.—Parol evidence is however admissible to explain any ambiguity in the contract. Thus, it has been admitted to prove the meaning of "C. O. D." *American Express Co. v. Lesen*, 39 Ill. 312. But while it may be admitted to explain the meaning of "C. O. D.," additional words not technical but ordinary and well defined in meaning, can not be explained or varied. *Collender v. Dinsmore*, 55 N. Y. 200. Where a freight bill was signed "W. P. Noell & Co., Agents," and did not appear upon the face to be the contract of the railroad company, it was held that parol evidence was not admissible to show that it actually was the contract of the company. *Dixon v. Columbus & I. R. Co.*, 4 Biss. (U. S.), 137. But where a shipping receipt given by a railroad company contained the words "Care R. R. Agent, Callahan," it was held, that such an ambiguity existed as might be explained by parol. *Savannah, F. & W. R. Co. v. Collins*, 77 Ga. 376; 4 Am. St. Rep. 87.

Same—Fraud or Mistake.—Fraud or mistake in making a bill of lading may always be proved by parol. *Steamboat Wisconsin v. Young*, 3 Greene (Iowa), 268. And a clause in a bill of lading limiting the responsibility of the carrier, may be proved by circumstantial as well as positive evidence to have been inserted by mistake. *Chouteaux v. Leech*, 18 Pa. St. 224.

Same—Previous Negotiations Merged in Writing.—If a bill of lading is delivered to the shipper at the time when the carrier receives the goods, all prior parol negotiations are merged in the writing. *Barber v. Brace*,

3 Conn. 9; *O'Bryan v. Kinney*, 74 Mo. 125; *Hill v. Syracuse, B. & N. Y. R. Co.*, 73 N. Y. 351; rev'g 8 Hun (N. Y.), 296; *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90. And the shipper is chargeable with notice of its contents. *Hill v. Syracuse, B. & N. Y. R. Co.*, 73 N. Y. 351; rev'g 8 Hun (N. Y.), 296; *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90. But it has been held that where a verbal agreement as to the shipment of freight has been made, and upon the subsequent delivery of the goods to the carrier, a written bill of lading is given, parol testimony of the verbal agreement may be introduced in an action in which the shipper denies that the bill of lading contains the contract between the parties and it is a question for the jury whether the goods were shipped under the parol agreement or under the written agreement. *Baker v. Michigan S. & N. I. R. Co.*, 42 Ill. 73; *Mobile & M. R. Co. v. Jurey (U. S.)*, 16 Am. & Eng. R. Cas. 132; *Pereira v. Central Pacific R. Co.*, 66 Cal. 92; *Union R. & T. Co. v. Riegel*, 73 Pa. St. 72.

Same—Effect of Delivery Subsequent to Shipment.—If the bill of lading is not delivered until after the shipment has been made, the parol agreement between the parties, upon which the goods were shipped is not superseded. *Michigan Cent. R. Co. v. Boyd*, 91 Ill. 268; *Wilde v. Merchants' Despatch Transp. Co.*, 47 Iowa, 247; *Gott v. Dinsmore*, 111 Mass. 45; *Detroit & M. R. Co. v. Adams*, 15 Mich. 458; *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712; rev'g 55 Barb. (N. Y.), 137; *Coffin v. New York Cent. R. Co.*, 64 Barb. (N. Y.), 379. And the shipper is not bound by a stipulation inserted in the bill of lading limiting the liability of the carrier; *Michigan Cent. R. Co. v. Boyd*, 91 Ill. 268; *Detroit & M. R. Co. v. Adams*, 15 Mich. 458; although the bill of lading provides that by accepting it, the shipper agrees to its conditions; *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712; rev'g 55 Barb., 137.

The possession by the owner of goods shipped of the receipt of the carrier containing restrictions upon his liability, is only *prima facie* evidence of the shipper's assent to the conditions, and may be contradicted by parol evidence of facts and circumstances containing its receipt. *Boorman v. American Express Co.*, 21 Wis. 152; *Strohn v. Detroit & M. R. Co.*, 21 Wis. 554. See also *Missouri Pac. R. Co. v. Beeson*, 30 Kan. 298. Accordingly, if a shipper of goods had previously entered into a special oral agreement with the company for their transportation, he had a right to presume that the written or printed receipt subsequently delivered to him contained nothing contrary to such agreement, and it has been held that a failure to make himself at once acquainted with its contents and to notify the carrier of his dissent was not sufficient to conclude him. *Strohn v. Detroit & M. R. Co.*, 21 Wis. 554.

But a written contract containing provisions limiting the liability of a railroad company as a common carrier in the transportation of cattle, was held in the absence of fraud or mistake to be the sole evidence of the contract between the parties and binding upon the shipper although signed by him after the cattle were loaded into the car with a previous verbal understanding as to the terms of the shipment and presented to him for signature when there was no sufficient time for examination before the departure of the train. *St. Louis, K. C. & N. R. Co. v. Cleary (Mo.)*, 16 Am. & Eng. R. Cas. 122.

Same—Deviation from Course.—Parol testimony is not admissible to establish an agreement to deviate from the usual course of trade in transporting the goods shipped; *Lawrence v. McGregor, Wright (Ohio)*, 193; and when the bill of lading does not specify the route to be followed by the vessel, the owner of the goods cannot prove a parol agreement as to the same. *White v. Van Kirk*, 25 Barb. (N. Y.), 16.

If the bill of lading specifies the course to be pursued by the vessel, parol

evidence is not admissible to prove an agreement that it might deviate therefrom; *Babcock v. May*, 4 Ohio, 334; and when by the bill of lading the right to call at certain specified ports is reserved, an agreement that the vessel should not call at one of these ports cannot be proved. The *Sidonian*, 34 Fed. Rep. 805. A bill of lading was executed in the following terms: "Shipped in apparent good order and condition on the steamship *Austria* now lying in the port of Fiume and bound for Dunkirk with liberty to call at any ports in order." Held, that the terms of the bill of lading imported a voyage directed from Fiume to Dunkirk subject to the liberty to call at any ports substantially within the course of such voyage, and that evidence was not admissible to show a parol agreement permitting the vessel to proceed to Glasgow, such port being altogether out of the course of the voyage. *Leduc v. Ward*, L. R. 20 Q. B. Div. 275. But a bill of lading signed by the master at the request of the charterer's agent is not conclusive evidence of the course of the voyage which the master is to pursue, where the charter contains mutual stipulations as to the course and the mode in which the vessel should be employed, and there are other circumstances tending to show that the bill of lading was not intended to be conclusive as to the course. *Cobb v. Blanchard*, 11 Allen, (Mass.) 409.

Parol testimony that it was agreed that a vessel should proceed directly to the final destination of the goods without stopping at the port of destination named in the bill of lading, goes to contradict the bill of lading, and is inadmissible; *Jones v. Warner*, 11 Conn. 40; and where the owners of a canal boat signed a contract in the form of a bill of lading by which they agreed to deliver a quantity of wheat to the plaintiff at New York, parol evidence of instructions by plaintiff's agent on the same day and place, before the contract was signed to send the wheat to a different party at another place, was held to be inadmissible. *Wolfe v. Myers*, 3 Sandf. (N. Y.), 7.

Same—Stowage of Goods.—When a clean bill of lading is given, it imports that, in the absence of a custom to the contrary, the goods shall be stowed under deck, and a parol agreement that they shall be carried on deck cannot be proved; *Barber v. Brace*, 3 Conn. 9; *Sayward v. Stevens*, 3 Gray (Mass.), 97; *The Wellington*, 1 Biss. (U. S.), 279; *The Delaware*, 14 Wall. (U. S.), 579; even in an action by the shipper and vendor against the purchaser for the price of the goods; *Creery v. Holly*, 14 Wend. (N. Y.), 26. But when there is a well known usage in reference to carrying cargo of the particular description as convenience may require either upon or under deck, the bill of lading only imports that it shall be carried in the usual manner, and parol testimony is admissible for the purpose of proving the custom. *Sproat v. Donnell*, 26 Me. 185.

Same—Evidence as to Terminus of Route.—Parol evidence tending to show that the undertaking of the contracting carrier was to deliver the goods at their final destination instead of at the *terminus* of its own line as stated in the bill of lading, is incompetent. *Hewitt v. Chicago, B. & Q. R. Co.* (Iowa), 18 Am. & Eng. R. Cas. 568; *Hinckley v. New York Cent. R. Co.*, 56 N. Y. 429; 3 Th. & C. (N. Y.), 281; *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 221; *Chouteaux v. Leech*, 18 Pa. St. 224. Similarly, where a bill of lading for goods signed to a point beyond the terminus of the receiving carrier's line is silent in respect to the line by which the goods are to be forwarded, parol evidence will not be admitted for the purpose of proving that a special line was agreed upon. *Snow v. Indiana, B. & W. R. Co.* (Ind.), 28 Am. & Eng. R. Cas. 77. But where the bill of lading purports to contract only for the delivery of the goods at the termination of the carrier's line, but also shows that the freight has been paid through to the final destination, parol testimony is admissible for the purpose of proving that the carrier's contract was not only to transport them over its own line,

but also to their final destination. Such testimony does not vary or contradict the written contract, but shows an additional contract to carry from the termination of the contracting carrier's route to the final destination. *Baltimore & P. S. Co. v. Brown*, 54 Pa. St. 77. A., by parol, made arrangements with the defendants, a railway company, to convey cattle for him to K. station; he at the same time, without noticing its contents, signed a consignment note, by which the cattle were directed to be taken to E., an intermediate station on the line to K. *Held*, that parol evidence was admissible to show that the defendants had agreed to carry on the cattle to K., as it did not contradict but only supplemented the written contract. *Malpas v. London & S. W. R. Co.*, L. R., 1 C. P. 336.

Same—Evidence as to Rate of Freight.—Where the bill of lading specifies the rate of freight to be charged by the carrier, parol testimony is not admissible to prove a verbal agreement to transport at a different rate. *Hopkins v. St. Louis & S. F. R. Co.* (Kan.), 16 Am. & Eng. R. Cas. 126; *Long v. New York Cent. R. Co.*, 50 N. Y. 76. But compare *McClean v. Miller*, 2 Cranch (C. C.), 620; *Simes v. Marine Ins. Co. of Alexandria*, 2 Cranch (C. C.), 618. Thus, where a bill of lading specified the freight to be "60 cents per hundred pounds at estimated weight," it was held, that parol testimony was not admissible to prove an agreement to transport the freight at 60 cents per hundred pounds actual weight. *Long v. New York Cent. R. Co.*, 50 N. Y. 76.

A shipper entered into a verbal agreement with a railroad company in regard to the carriage of live stock whereby the company agreed to allow the shipper the usual rebates in freight. Subsequently, upon the shipment of each car load of live stock, a bill of lading was delivered containing no stipulations for such rebates. In an action by the shipper against the company to recover the amount of the rebates, *held*, that the plaintiff could not establish by parol evidence the fact that it was the intention of the parties that the bill of lading should operate only as regards the liability of the company, and that as to all other matters, the written contracts were subject to and controlled by the provision of the parol agreement. *Hopkins v. St. Louis & S. F. R. Co.* (Kan.), 16 Am. & Eng. R. Cas. 126.

Where a bill of lading specified an agreed rate for the transportation of lumber, it was held that parol evidence was not admissible to prove an agreement that the rates specified were to be demanded only if the sale of the lumber should produce a sum sufficient to pay them, but if not, that the amount payable should be limited to the sum released from the sale. *Gardner v. Chace*, 2 R. I. 112.

But parol testimony will be received to establish the meaning of the stipulation for freight according to the usage of the trade. Thus, by a bill of lading of wool from Odessa, freight was to be paid in London on delivery "at the rate of 80s. per cwt. gross weight, tallow and other goods, grain or seed in proportion as per London Baltic printed rules." It was held that extrinsic evidence was admissible to show that by the usage of the trade, the meaning of the bill of lading was that 80s. per cwt. of tallow was to be taken as the standard by which the rate of freight on the other goods was to be measured. *Russian Steam Nav. Co. v. Silva*, 1 C. B. N. S. 610.

If the consignee is a stranger to the shipment and not a party to the bill of lading in making it, as to him, the bill of lading cannot be contradicted by proving that no freight had been paid. *Portland Bank v. Stubbs*, 6 Mass. 422.

Same—Stipulation as to Liability for Loss.—The terms of a bill of lading as to the carrier's responsibility for risk or unavoidable loss, cannot be controlled or varied by parol evidence. *Pemberton Co. v. New York Cent. R. Co.*, 104 Mass. 144; *Arnold v. Jones*, 26 Tex. 335. But where a bill of lading stipulates that in consideration of a reduced rate, the carrier shall be

exempt from liability beyond a fixed amount, parol evidence is admissible as between the parties to show that the recital that the rate charged was a reduced one was false, and that therefore the limitation was not binding upon the shipper; *McFadden v. Missouri Pac. R. Co.* (Mo.), 30 Am. & Eng. R. Cas. 17; and in *Atwell v. Miller*, 11 Md. 348, it was held that the contract contained in the bill of lading may be modified by adding thereto, a parol supplementary agreement that freight prepaid should be at the risk of the shipper in the event of the failure of the carrier to complete the voyage, and that such special agreement might be proved by parol.

Same—Agreements as to Time of Shipment.—When by a bill of lading it is contracted that the goods shall be transported and delivered without unnecessary delay, it cannot be proved by parol that the carrier agreed that they should be shipped upon the day on which they were received by him. *Indianapolis & C. R. Co. v. Remmy*, 13 Ind. 518.

Same—Agreements as to Time and Mode of Delivery.—A guaranty or warranty that the goods shall be delivered on or before a particular day, cannot be proved by parol; *Petrie v. Heller*, 35 Fed. Rep. 310, and when no time for the discharge of the cargo is specified in the bill of lading, the usage at the port of discharge governs the contract, and evidence of an oral contract that the vessel should not be detained beyond a specified time is inadmissible. *Higgins v. U. S. Mail S. S. Co.*, 3 Blatchf. (U. S.), 282.

In *Wayne v. Steamboat General Pike*, 16 Ohio, 422, the carrier relied upon custom for the purpose of proving that delivery to a wharf boat without notice to the consignee was sufficient to exonerate him. It was objected that as the bill of lading required the goods to be delivered to the consignee, the proposed testimony went to contradict the contract. The court held that where the terms used in bills of lading have by usage acquired a particular signification, the parties will be presumed to have used them in that sense, but that usage would not be permitted to control the terms used except it was established by clear and satisfactory proof.

Representations made before the execution of a bill of lading by the consignor as to the depth of water at the place of landing named therein, cannot be given in evidence by the owner of a ship in an action against him by the consignee for the loss of the goods. *Shaw v. Gardner*, 12 Gray (Mass.), 488.

Same—Evidence as to Parties to Contract.—Parol evidence is admissible for the purpose of proving that the contract of affreightment was made with a person other than him in whose name the bill of lading was executed. *McTyer v. Steel*, 26 Ala. 487. But see *Center v. Torrey*, 8 Martin (La.), 206.

If no person is specified in the bill of lading as contracting to carry the goods, the owner of the goods may show who was the owner of the vessel named in the bill of lading by which the goods were to be carried. *Goodrich v. Mallory*, 52 Barb. (N. Y.) 87.

Parol evidence that goods were shipped by the shipper as agent of the plaintiff, is not admissible after an admission that the contract for carriage was in writing. *Peck v. Dinsmore*, 4 Porter (Ala.), 212. But where the bill of lading is signed "A. B. for the Master," the authority of A. B. to sign it may be proved by parol. *Putnam v. Tillotson*, 13 Met. (Mass.), 517.

Same—Evidence as to Vessel upon Which Shipment was Made.—Although a bill of lading recites that the goods were shipped upon a certain vessel, parol testimony is admissible for the purpose of proving that they were in fact shipped upon another vessel. *Hedricks v. Steamship Morning Star*, 18 La. Ann. 353.

Same—Evidence as to Shipper's Right of Property.—A shipper named in a bill of lading may sue the carrier for an injury to the goods although he

has no property, general or special, therein, and parol testimony is not admissible for the purpose of proving absence of property. *Blanchard v. Page*, 8 Gray (Mass.), 281.

Same—Evidence of Agreement to Feed Live Stock.—Where it appears that the contract for the carriage of live stock is in writing, parol testimony as to the undertaking of the shipper to feed and provide for the live stock, is inadmissible. *Missouri Pac. R. Co. v. Fagan* (Tex.), 35 Am. & Eng. R. Cas. 666.

Bills of Lading as Receipts—Parol Testimony.—In respect to the clause in a bill of lading which operates merely as a receipt for goods, it is open to explanation and contradiction as parol proof. *Goodrich v. Norris*, Abb. 196; *Knox v. The Ninetta*, 1 Crabbe 534; *Butler v. The Steamboat Arrow*, 1 Newb. 59; *The Delaware*, 14 Wall. (U. S.), 579; *Wayland v. Mosely*, 5 Ala. 430; *Great Western R. Co. v. McDonald*, 18 Ill. 172; *O'Brien v. Gilchrist*, 34 Me. 554; *Sears v. Wingate*, 3 Allen (Mass.), 103; *Shepherd v. Naylor*, 5 Gray (Mass.), 591; *Steamboat Missouri v. Webb*, 9 Mo. 193; *Ellis v. Willard*, 9 N. Y. 529; *Wolfe v. Myers*, 3 Sandf. (N. Y.), 7; *Wood v. Perry*, *Wright* (Ohio), 240; *Cafiero v. Welsh*, 8 Phil. (Pa.), 130; 1 Leg. Gaz. R. 121.

Same—Evidence as to Consideration.—The consideration clause in bills of lading has only the force and effect of a receipt, and is open to explanation and contradiction by parol evidence. *McFadden v. Missouri Pac. R. Co.* (Mo.), 30 Am. & Eng. R. Cas. 17.

Same—Bills Signed in Blank.—A bill of lading signed in blank by the master, is beyond his implied authority, and does not bind the owner of the vessel, and the circumstances connected with the signing and delivery of such a bill of lading may be inquired into. *The Joseph Grant*, 1 Biss. (U. S.), 193.

Same—Recital of Quantity Shipped.—It is not within the scope of the authority of the master of a vessel to sign bills of lading for goods not actually received. *Sears v. Wingate*, 3 Allen (Mass.), 103; *Hubbersty v. Ward*, 8 Exch. 330. The recital in a bill of lading as to the quantity or weight of the goods received is only *prima facie* evidence thereof in an action between the parties, and may be explained or contradicted by parol testimony tending to show that the quantity stated was not actually received; *Goodrich v. Norris*, Abb. Adm. 196; *Manchester v. Milne*, Abb. Adm. 115; *The J. W. Brown*, 1 Biss. (U. S.), 76; *The Henry*, Bl. & How., 465; *The Freeman v. Buckingham*, 18 How. (U. S.), 341; *The Tuskar*, *Sprague* (U. S.) 71; *Sutton v. Kettell*, 1b. 309; *The Lady Franklin*, 8 Wall. (U. S.), 325; *Wallace v. Long*, 8 Ill. App. 504; *Hunt v. Mississippi Cent. R. Co.*, 29 La. Ann. 446; *Kirkman v. Bowman*, 8 Rob. (La.), 246; *Witzler v. Collins*, 70 Me. 290; 35 Am. Rep. 327; *O'Brien v. Gilchrist*, 34 Me. 554; *Strong v. Grand Trunk R. Co.*, 15 Mich. 206, 93 Am. Dec. 184; *Abbe v. Eaton*, 51 N. Y. 410; *Meyer v. Beck*, 28 N. Y. 590, aff'g 33 Barb. 532; *Graves v. Harwood*, 9 Barb. (N. Y.), 477; *Ward v. Whitney*, 3 Sandf. (N. Y.), 399; *Dean v. King*, 22 Ohio St. 118; *Meyer v. Dresser*, 16, C. B. N. S. 646; *Blanchet v. Powell's Llantivit Collieries Co.*, L. R., 9 Exch. 74; *Jessel v. Bath*, L. R., 2 Exch. 67; *Brown v. Powell Duffryn Steam Coal Co.*, L. R., 10 C. P. 562; *McLean v. Fleming*, L. R., 2 Sc. App. 128; *Bates v. Todd*, 1 Moo. & Rob. 106. But when the bill of lading for goods shipped contains the words "quantity guaranteed," the carrier is responsible for the delivery of the quantity specified. *Bissel v. Campbell*, 54 N. Y. 353.

But the master is estopped as against the consignee who is not a party to the contract, and as against the assignee of the bill of lading when either has taken it for a valuable consideration upon the faith of the acknowledgments which it contains, from denying the truth of the statements to which he has given credit by his signature, so far as these statements relate

to matters which are or ought to be within his knowledge; *Relyea v. New Haven Rolling Mill Co.*, 42 Conn. 579; *Sears v. Wingate*, 3 Allen (Mass.), 103; and in such case, the bill of lading is conclusive as to the shipment of the goods and also as to the quantity shipped; *Dickerson v. Seclye*, 12 Barb. (N. Y.), 99; *Bank of Batavia v. New York, L. E. & W. R. Co.* (N. Y.), 32 Am. & Eng. R. Cas. 497; *Brooke v. New York, L. E. & W. R. Co.* (Pa.), 21 *Id.* 64; *Norris v. Milwaukee Dock Co.*, 21 Wis. 130, 91 Am. Dec. 404. But the decisions are not unanimous on this point; *Friedlander v. Texas & P. R. Co.* (U. S.), *ante* p. 70.

A bill of lading is not conclusive however, in favor of one who did not make title under it, but whose purchase was made prior to the shipment. *Meyer v. Peck*, 28 N. Y. 590, aff'g 33 Barb. (N. Y.), 532. And the consignee of a cargo cannot maintain an action against the master of a vessel who has receipted in a bill of lading for a larger amount of goods than was actually put on board, if it appears that the consignee has not paid for the goods on the faith of the bill of lading, and has an agreement with the shippers that he is only to pay them for what he receives, unless he can recover of the master the difference between this amount and the amount named in the bill of lading. *Hall v. Mayo*, 7 Allen (Mass.), 454. See also *Ryder v. Hall*, 7 Allen (Mass.), 456.

Same—Acknowledgement of Good Condition.—An acknowledgement in a bill of lading that the goods are received in good order and condition, is only *prima facie* evidence of their condition and may be explained or contradicted by parol. *The Adriatic*, 16 Blatchf. (U. S.) 424; *The Pacific*, Deady 17; *The Ship Martha*, Olc. 140; *Illinois Cent. R. Co. v. Cobb*, 72 Ill. 148; *Illinois Cent. R. Co. v. Cowles*, 32 Ill. 116; *Bissell v. Price*, 16 Ill. 408; *Mitchell v. U. S. Express Co.*, 46 Iowa 214; *Gowdy v. Lyon*, 9 B. Mon. (Ky.), 112; *Kimball v. Brander*, 6 La. 711; *Witzler v. Collins*, 70 Me. 290, 35 Am. Rep. 327; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339; *Richards v. Doe*, 100 Mass. 524; *Barrett v. Rogers*, 7 Mass. 297; *Nelson v. Stephenson*, 5 Duer (N. Y.), 538; *Glass v. Goldsmith*, 22 Wis. 488. Such an acknowledgment is only applicable to their apparent good order and condition, and does not extend to the quality of the material in which they are enveloped, nor to secret defects in the goods themselves. *Benjamin v. Sinclair*, 1 Bailey (S. Car.), 174. See also *Choate v. Crowninshield*, 3 Cliff. (U. S.), 188; *The Olbers*, 3 Ben. (U. S.), 148; *Nelson v. Woodruff*, 1 Black (U. S.), 156; *Keith v. Amende*, 1 Bush. (Ky.), 455; *Hastings v. Pepper*, 11 Pick. (Mass.), 41, 43. If a bill of lading acknowledges that goods in packages have been "shipped in apparent good order," the word "apparent" does not change the legal effect of the bill. *The Oriflamme*, 1 Sawy. (U. S.), 76. When the goods have been receipted for as in good order, the carrier may show the circumstances under which he gave the receipt and may prove that he desired to sign a receipt for them as "in poor condition," but was not allowed to do so. *Tierney v. New York Cent. & H. R. R. Co.*, 67 Barb. (N. Y.), 538.

The words "contents unknown" annexed to a bill of lading implies that the master only intended to acknowledge the shipment of goods in good order as to their external condition. *Clark v. Barnwell*, 12 How. (U. S.) 272; *The Columbo*, 3 Blatchf. (U. S.), 521. See also *The Prosperino Palasso*, 29 L. T. 622; *The Ida*, 32 L. T. 541.

The words in a bill of lading for a cargo of iron "bars and bundles rusty" with the words "in good order and condition," are a mere statement of fact, and may be explained or contradicted by parol. *The Nith*, 36 Fed. Rep. 86.

An acknowledgment of the receipt of goods in good order and condition casts upon the carrier the burden of proving that the damage to them arose from causes existing before he received them. *Illinois Cent. R. Co.*

v. Cowles, 32 Ill. 116; *Bissel v. Price*, 16 Ill. 408; *Hastings v. Pepper*, 11 Pick. (Mass.) 41, 43; *Price v. Powell*, 3 N. Y. 322; *Blade v. Chicago, St. P. & F. R. Co.*, 10 Wis. 4; *Nelson v. Woodruff*, 1 Black (U. S.) 156; *The Ship Howard v. Wissman*, 18 How. (U. S.) 231. The insertion of the usual clause "weight, contents and value unknown," does not cast upon the owner of the goods the burden of proving that the goods were injured after they were received by the carrier, and that injuries did not arise from defects existing at the time of shipment; *English v. Ocean Steam Nav. Co.*, 2 Blatchf. (U. S.) 425; and where the evidence tends to show that the goods did not receive the damage complained of while in the carrier's possession, a receipt stating that they were "in apparent good order," does not relieve the consignor from proving their condition at the time of delivery to the carrier. *Chicago & A. R. Co. v. Benjamin*, 63 Ill. 283.

Same—Evidence to Disprove Title of Consignee.—The consignee named in the bill of lading is *prima facie* the owner of the goods. *Webb v. Winter*, 1 Cal. 417; *Lawrence v. Minturn*, 17 How. (U. S.) 100. But this presumption is only *prima facie* and may be repelled by parol evidence. *Harrison v. Hixson*, 4 Blackf. (Ind.) 226; *Hooper v. Chicago & N. W. R. Co.* 27 Wis. 81. See, also, *Chapin v. Siger*, 4 McL. (U. S.) 378; *Maryland Ins. Co. v. Ruden*, 6 Cranch (C. C.) 338. Accordingly, the consignor of the goods may in an action against the carrier for their loss, introduce the bill of lading to prove the delivery of the goods, and then show by parol that the property of the goods is vested in himself and not in the consignee. *Harrison v. Hixson*, 4 Blackf. (Ind.) 226.

BALTIMORE & OHIO EXPRESS CO.

v.

COOPER.

(*Mississippi Supreme Court, May 27, 1889.*)

Carriers of Goods—Stipulation for Notice of Claim.—Failure to present a claim in writing at the express office which issued the receipt for goods, in accordance with a condition contained in the receipt is no defense to a claim for damages for negligence by that office in not sending forward the goods, there being no necessity of notifying that office of a claim of which it was fully cognizant.

APPEAL from Superior Court, Clark County.

Action by W. P. Cooper against the Baltimore & Ohio Express Co. to recover damages for delay in forwarding certain machinery delivered by the plaintiff to defendant for transportation. The plaintiff received the usual receipt from the agent of the company at the point of shipment, and the de-

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fense relied upon by the company was that he had failed to comply with a stipulation therein, requiring him to file with the company a written claim for damages within 30 days. The defendant appeals from a judgment for the plaintiff.

D. W. Heidleberg for appellant.

T. A. Wood for appellee.

CAMPBELL, J.—The only point made by the appellant deserving special mention is that the claim for the loss or damage was not presented in writing at the office which issued the receipt, etc., in accordance with a condition contained in it; and our view is that this condition is not applicable to this case, because the claim here sued on is for damages for negligence by that office in not sending forward the article named, and there was no necessity to bring to the notice of the company at that office the claim for what that office was fully cognizant of, its negligence having caused the loss. Affirmed.

Notice of
claim.

Notice of Claim for Damages.—See *Hartwell v. Northern Pac. Express Co.* (Dak.), 37 Am. & Eng. R. Cas. 635; *Glenn v. Southern Express Co.* (Tenn.), 35 *lb.* 627; *Pacific Express Co. v. Darnell* (Tex.), 32 *lb.* 543; *Gulf, C. & S. F. R. Co. v. Trawick* (Tex.), 30 *lb.* 49, note 57; *Missouri Pac. R. Co. v. Harris* (Tex.), 28 *lb.* 107; *Sprague v. Missouri Pac. R. Co.* (Kan.), 23 *lb.* 684; *International & G. N. R. Co. v. Underwood* (Tex.), 21 *lb.* 143; *Gulf, C. & S. F. R. Co. v. Maetz* (Tex.), 18 *lb.* 613, note 618.

GOOD *et al.*

v.

GALVESTON, HARRISBURG & SAN ANTONIO R. CO.

(*Texas Supreme Court, April 30, 1889.*)

Carriage of Live Stock—Stipulation for Notice of Claim—Validity.—When a contract for the carriage of live stock stipulates that written notice must be given to some officer of the company, or the nearest station agent, of any loss or injury to the stock before it is removed from the place of delivery or mingled with other stock, the company must, in an action against it, show that it had an officer or agent at or near the place where notice was to be given, otherwise the stipulation will be deemed to be unreasonable and ineffectual.

Carriers—Action for Damages—Pleading—Proof of Partnership.—In an

action for damages in transit, if the petition alleges that the plaintiffs were partners, and there is no denial of this allegation under oath, the partnership need not be proved.

Same—Property in Damaged Stock—Evidence.—A petition in an action for damages to live stock alleged that the plaintiffs were partners, and that the cattle were shipped by their partner and representative, P. A witness testified that he knew the plaintiffs; that he bought part of the lot of cattle shipped, and that they were in the stock pen at the railroad. P. testified that the cattle were the lot of cattle shipped by him over defendant's railroad. *Held*, the evidence authorized the inference that the cattle belonged to plaintiffs as alleged.

Same—Live Stock—Negligence in Transportation—Evidence.—Where the evidence shows that there was unnecessary delay in the transportation of live stock; that the cattle were needlessly confined in the cars at the different stations; and that they were bruised and bumped by the stalling of the train on account of its size and weight, a cause of action against the carriers for gross negligence and carelessness is sufficiently established.

Same—Statutory Penalty—Sufficiency of Evidence.—Under a statute which imposes upon comr. on carriers a penalty for failure to feed live stock during transit, the statutory grounds of liability should be particularly set forth in an action for the penalty, and should be clearly established by the proof; and where two places were alleged to be the feeding stations on the route, and the evidence shows that the cattle were fed at one, and it is not satisfactorily shown that they were not fed at the other, there can be no recovery.

COMMISSIONERS' decision. Appeal from District Court, Bexar County.

Action by Good, Williams & Peoples against the Galveston, Harrisburg & San Antonio Railway Company for damages to beef steers, while in transit over defendant's road from San Antonio, Texas, to Algiers, Louisiana. The evidence was that the cattle belonged to plaintiffs, were shipped by Peoples on December 13, 1884, over defendant's road from San Antonio, Texas, to Algiers, Louisiana, under a shipping contract made in writing with defendant, known as a "live-stock contract," setting forth that there were 5 car loads, containing 100 beef steers, to be delivered at Algiers, Louisiana. The contract in evidence recited the payment of freight by Peoples at the rate of \$100 per car-load. The contract stipulated several restrictions as to the liability of defendant, one of which was a condition precedent to the right of recovery of damages by plaintiffs, that written notice must be given to some officer of defendant, or the nearest station agent, of any loss or injury to his stock, before it was removed from the place of delivery, or mingled with other stock. This was signed by Peoples hurriedly by lamp-light after the cattle were loaded, and the train waiting. The 100 head of cattle were in good condition when shipped, weighing on an average, about 1,000 pounds each. The five cars containing them reached Houston the next day, December

14th, at three o'clock, where they remained in the cars, not unloaded, until the morning of the 15th December, at 7 o'clock, when they were unloaded. The train was to leave that evening, at 7 o'clock; and, against Peoples' remonstrances, the cattle were placed in the cars at 3 o'clock and switched about, and injured, and run back into the yard, where they remained until 2 o'clock in the morning, when the train started to Orange and Vermillionville. One of the cattle died in Houston. The train had so many cars that it could not get along, and part of it had to be cut off at Orange. A great deal of time was lost between Houston and Vermillionville, there being over seven hours' delay. The train did not make over five miles per hour between Houston and Orange. It would stall, and had to be divided, and to be run forward and backward to get headway. It reached Vermillionville at 10 o'clock that night. Peoples looked for the station agent, went to his office, but could not find him. He found the train dispatcher who said he had received no notice that the cattle were on the way. The next morning the cattle were unloaded, and were put in a pen where they sank to their bodies in mud, and so remained until the next evening, at 7 o'clock. They could take no food on account of the mud. At about ten o'clock the next day, December 18, 1884, they reached Algiers, where one of the steers died. The others were much damaged by the treatment received; lost at least one-fourth of their value. Not more than 25 or 30 were marketable. They were put in pastures, and sold at reduced figures. They did not weigh over 850 pounds when at New Orleans. If they had arrived in proper condition they would have been worth $4\frac{1}{4}$ cents per pound. It was shown that, when properly cared for, cattle so transported would lose 8 or 10 per cent. in weight. Defendant's agents had control of the feeding of the stock, and did not permit the shipper to handle or feed them. It was in evidence that the customary freight paid on cattle was \$100 per car-load. Defendant offered no evidence, but demurred to the evidence of plaintiffs: plaintiffs declining to join in the demurrer. The defendant thereupon filed its "demurrer to said evidence, also admitting the truth of the plaintiffs' said evidence, and any conclusion that may be drawn from it." Upon which admission the plaintiffs joined in the demurrer, which was sustained. Plaintiffs appeal. By Rev. St. Tex. art. 284, it is made "the duty of a common carrier who conveys live-stock of any kind to feed and water the same during the time of conveyance, and until the same is delivered, * * * and any carrier who shall fail to so feed and water said live-stock sufficiently shall be liable to the party injured for his damages, and

shall be liable also to a penalty of not less than 5 nor more than 500 dollars, to be recovered by the owner," etc. By article 1265 "an answer setting up any of the following matters * * * shall be verified by affidavit. * * * A denial of a partnership as alleged in the petition, whether the same be on the part of the plaintiff or defendant * * *"

Aycock & Clifford for appellants.

Waelder & Upson for appellee.

HOBBY J.—The only questions to be determined upon this appeal are whether the court erred in sustaining the defendant's demurrer to the plaintiff's evidence, introduced in support of their allegations of damage caused by the defendant's gross negligence in the transportation of their cattle over its road; and if so, then the truth of said evidence being admitted, as well as any conclusion which may be drawn from it, what are the damages to which plaintiffs are entitled under the facts proven?

Questions involved.

The practice of demurring to evidence has not obtained extensively in this state; and, while this right has been discussed and admitted in several cases, there appears to be no statutory recognition of it in any of the acts regulating the proceedings in our courts; the probable reason for which is that it operates to transfer from the jury to the court the decision of disputed questions of fact which, under our system, the former tribunal is regarded as being peculiarly adapted to determine in this class of cases. Where the evidence is in writing, and the facts proved are certain and cannot be varied, it is said a party may be compelled to join in a demurrer to evidence; but, in those cases where the evidence is by parol, and indeterminate, and may be urged with more or less effect before a jury, its withdrawal from the jury cannot be attained in this way unless the demurrant admits every fact and conclusion which the evidence conduces to establish. *Booth v. Cotton*, 13 Tex. 361.

Demurrers to evidence.

In the case before us, the demurrer to the evidence was accompanied with the admission by the defendant of its truth, and of "every conclusion which may be drawn from it." We have given a statement of the allegations constituting the plaintiffs' cause of action, and a synopsis of the testimony adduced before the jury in support thereof; and, applying to this evidence the defendant's admission of its truth, and the truth of every conclusion to be drawn from it, made by the demurrer, we are of opinion that the right of the plaintiffs to recover damages is abundantly established, and that the court erred in sustaining the demurrer and in rendering judgment for the defendant.

We are not informed upon what grounds the plaintiffs were denied a recovery ; but the propositions argued in the brief for the appellee indicate that, as a condition precedent to the right of plaintiffs to recover damages, they had failed to give notice in writing to some officer or nearest station agent of the defendant of the injury to the cattle, before they were delivered, or mingled with other stock. This limitation, which was contained in the live-stock contract, and which restricts the common-law liability of the carrier, was elaborately discussed in the case of *Mo. Pac. R. Co. v. Harris*, 67 Tex. 172, and it was said of it, by Chief JUSTICE STAYTON that "it may well be doubted if such a contract as relied on in this case ought ever to be sustained ;" that, "if a carrier sets up a claim to notice of a given fact, as a consideration upon which its liability to a shipper is to depend,—then it is incumbent on it, when the notice was to be given to one of its officers or agents, to show that it had an officer or agent at or near the place where the notice is to be given, in any case in which the shipper, by the terms of the contract, is to hold the property shipped at the place of delivery, to be inspected by some agent of the carrier, and at his own expense and risk." There is no such claim set up in the defendant's answer in this case ; and the proof, with the conclusions fairly deducible from it, clearly shows that, in this case, the limitation was an unreasonable one ; hence we are of opinion that this condition in the contract, if not complied with by the plaintiffs, could have afforded no valid ground for the judgment sustaining the demurrer, and against the plaintiffs.

It is argued by the defendant that there was no proof that the plaintiffs owned the property, but that the evidence showed that the cattle belonged to Peoples. The petition alleged that the plaintiffs, Good, Williams & Peoples, were partners in the live-stock business ; that the cattle were shipped on defendant's road through their partner and representative, Peoples. There was no denial of this under oath, and the partnership was therefore unnecessary to be established by proof. *Lindsay v. Jeffray*, 55 Tex. 641. As to the evidence of ownership by plaintiffs, the first witness, Hoefling, testified that he knew the plaintiffs ; that he bought 30 head out of the lot of 160 cattle, for which he paid them \$30 each for the smallest ; that they were in the stock-pen at the railroad. Plaintiff Peoples testified that these cattle came from Shinors' ranch, and were the lot of cattle shipped by him over the defendant's road. We think this evidence authorized the inference that the cattle belonged to plaintiffs, as alleged.

Stipulation
requiring no-
tice of claim.

Title to prop-
erty—Part-
nership.

The grounds upon which we think the plaintiffs are entitled to recover are the gross negligence and carelessness of the defendant's agents in handling and transporting the cattle. This negligence and carelessness consisted of the unnecessary delay in their transportation; the needless confinement in the cars of the cattle at the different stations on this road; and the bruising and bumping of the stock, to which they were subjected, by the improper transportation from Houston to Orange.

Negligence of carrier.

There is a general averment that the cattle were not properly fed and watered. The proof, however, upon this point is not sufficient to authorize the assessment of the statutory penalty prescribed by article 284 of the Revised Statutes. Where a recovery is sought of a penalty or forfeiture under a statute, the statutory grounds should be particularly set forth, and should be clearly established by the proof. The evidence showed that the cattle were well fed at Houston, and it is not satisfactorily shown that the cattle were not so fed at Vermillionville, which places were alleged to be the feeding stations.

Under the practice which obtains in cases where a demurrer to the evidence is sustained, the court here proceeds to render the judgment which should have been rendered in the court below. *Booth v. Cotton*, *supra*; *Harwood v. Blythe*, 32 Tex. 804; *Stephens v. Hix*, 38 Tex. 659. The evidence in this case shows that 100 head of cattle were shipped by the plaintiffs, two of which died on the road, valued at \$90; that their average weight was 1,000 pounds, making a total of 98,000 pounds. That plaintiffs lost, in the transportation of the cattle, 25 per cent. of their weight. That 8 per cent of this loss would have occurred had they been properly transported and delivered. This would make his loss through the negligence of the defendant, 17 per cent. It is further shown that he would have realized $4\frac{1}{4}$ cents per pound for the weight of the cattle thus lost; showing the amount of damage to be \$791.35, to which sum, if the \$90 be added,—the value of two head dying on the road,—his total damage would be \$881.35; and we are of opinion that the judgment should be reversed, and here rendered for said sum of \$881.35 for the plaintiffs.

Practice of appellate court when demurrer to evidence is sustained.

STAYTON, C. J.—Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and rendered in accordance with said opinion.

Carriage of Live Stock—Stipulation for Notice of Claim.—See *Missouri Pac. R. Co. v. Fagan* (Tex.), 35 Am. & Eng. R. Cas. 666, note 678; *Owen*

v. Louisville & N. R. Co. (Ky.), 35 *Id.* 687; Gulf, C. & S. F. R. Co. v. Trawick (Tex.), 30 *Id.* 49, note 56; Black v. Wabash, St. L. & P. R. Co. (Ill.), 25 *Id.* 388; Chicago, St. L. & N.O. R. Co. v. Abels, (Miss.) 21 *Id.* 105; Texas C. R. Co. v. Morris (Tex.), 16 *Id.* 259.

HULL

v.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R. CO.

(*Minnesota Supreme Court, October 26, 1889.*)

Carriers—Limitation of Liability—Negligence—Burden of Proof.—Where, by special contract, the liability of a common carrier of goods is limited to loss or injury through his negligence, the carrier must, to excuse himself, after loss or injury is shown, show that it occurred from some cause other than his negligence. He must show there was no negligence on his part.

APPEAL from District Court, Hennepin County.

J. H. Howe, S. L. Perrin and Weed Munro for appellant.

Thos. F. Leftwich for respondent.

GILFILLAN, C. J.—At Minneapolis plaintiff delivered to defendant, a common carrier, 18 horses, to be by it transported upon its railroad from Minneapolis to Ashland, Wis.

Facts.

The evidence tends to show they were in good condition when they were so delivered, and that in the course of transportation two died, and several others were injured. The action is to recover damages. On the trial, at the close of the plaintiff's evidence, the court dismissed the action. On plaintiff's motion it afterwards ordered a new trial, and from that order this appeal is taken.

By the written contract for carriage, executed by the parties, it was stipulated that the plaintiff should "load, feed, water, and take care of such stock at his own expense and risk, and will assume all risk of injury or damage that the animals may do to themselves or each other, or which may arise by delay of trains;" and also "that said company shall not be liable for loss by jumping from the cars, delay of trains, or any damage said property may sustain, except such as may result from a collision, or when the cars are thrown from the track in course of transportation." The court below seems to have dismissed the action on the grounds that, under the

contract limiting the defendant's liability, the burden of proof upon the matter of defendant's negligence was upon the plaintiff; that he had not introduced evidence of negligence sufficient to make a question for the jury; and that there was contributory negligence on the part of the plaintiff. The only question argued here at any length is, was it necessary for plaintiff, in order to make out a cause of action, to show that the death of the horses and injury to others was caused by defendant's negligence; or was it enough for him to prove their delivery for carriage in good condition, and the injury to them during the carriage, leaving it then for defendant to excuse itself by showing that the damage was not due to negligence on its part? But we will say in passing that, wherever the burden of proof lay, the case ought to have gone to the jury, for there was evidence from which the jury might have found that the injury to the horses was caused by the negligent manner in which defendant's train was handled. It appears that with the full train, without detaching any of the cars from the engine, those in charge "bucked snow," as it is called. As a witness described it, "they would take a running jump at a snow-drift." And this appears to have caused so violent shocks that, as a witness testified, one could not stand, and could hardly sit, in the caboose, which seems to have been at or near the rear of the train, while the car in which the horses were was pretty well up in front, where the shocks would be more violent. It ought to have been left to the jury to say whether that was the way in which the train was managed; whether that was a prudent way of managing a train carrying live-stock; and whether the injury to the horses was caused by it. As to contributory negligence on the part of plaintiff, the evidence was not such that the court could properly determine it. The most that can be said of it is that it ought to have been submitted to the jury. But, because the court below seems to have granted a new trial for the reason that on the trial it misapprehended the rule as to the burden of proof as to negligence, we will consider that question.

The contract, in terms, exempts the defendant from liability for damages, except such as might result from collision or the cars being thrown from the track. This goes further than the law permits a common carrier to go in limiting his liability. Since the Christenson Case, 15 Minn. 270 (Gil. 208), it has been settled by judicial decision in this state that a common carrier cannot exonerate himself by contract from liability for his own negligence, and this rule is now recognized by statute. Section 26, c. 188, Gen. Laws 1885. The most favorable con-

Stipulation
exempting
from liability.

struction for the defendant which could be given to this contract would hold that it exempts it from liability for damages from any cause but its own negligence and collisions, and the cars being thrown from the track. In *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506, the contract attempted to exempt the carrier except for gross negligence. The court held it went further than the law allowed, and treated it as a contract exempting the carrier except for negligence of any degree.

The rule as to the burden of proof held in that case is applicable to this; and upon further examination and consideration we are satisfied that the rule is justified by reason and public policy. The common law excepts from the carrier's liability loss or damage caused by act of God or the public enemy. No one would contend but that, where the common-law liability is not varied by contract, the carrier, to excuse himself, must show that the loss or damage was within one of the exceptions to his liability; that it was caused either by the act of God or of the public enemy. Such proof would make a *prima facie* case of non-liability. The plaintiff might then show that, but for the carrier's negligence, the loss or damage would not have occurred, though caused apparently by one of the excepted causes. The reason why proof of loss by the act of God or the public enemy makes a *prima facie* case of non-liability is that in the nature of things those causes of loss arise without fault of the carrier. He can in no case be responsible for their existence, though he may be for bringing the goods within their operation. Suppose by special contract the parties except one other cause of loss, say by fire, why, in that case, should the owner be required to prove in the first instance that the loss did not occur from that excepted cause? Inasmuch as such a cause of loss may arise by negligence of the carrier, it may be doubted (and we do not in this case decide it) that proof of loss from such a cause, without evidence that it did not arise through negligence of the carrier, would make a *prima facie* case of non-liability; certainly nothing short of evidence that the loss was from the excepted cause would excuse him. It must be borne in mind that the liability is not created by the special contract. The law creates the liability, and merely permits the parties to except from it certain causes of loss. *Prima facie*, the carrier is liable upon proof of delivery and acceptance for carriage, and of loss or damage in carrying. If there be any contract varying his liability he must show it, and that the loss came within the exception made by it. It is not for the owner to prove there was no such contract. And if such a contract be proved it would seem illogical to require of him to show that the loss did not occur from the cause excepted by it.

If the contract, instead of specifying certain exceptions to the liability, is general in its terms, and excepts from the liability all causes of loss or damage but the carrier's negligence, how does the carrier show that the loss or damage was within the exception, but by proof that it occurred from a cause other than his negligence? Some of the courts, to justify putting the burden of proof as to negligence on the plaintiff, consider the carrier, where his liability is varied by contract, as a private or special, and not a common, carrier. This would make the carrier's character, whether common or private, depend not on the character of the business he is engaged in, or holds himself out to the world to be engaged in, but on whether he has, by contract, varied, even in the slightest particular, the liability which the law, in the absence of contract, imposes on him. We cannot accept such a doctrine. We think the common carrier remains such even though in the particular case he may have, to some extent, limited his liability by contract, and that all the rules of law applicable to common carriers apply to such a case except in so far as the parties may by express contract, have varied them. The severe rule of liability of the common law was imposed largely from considerations of sound public policy. A common carrier is engaged in a public employment. Ordinarily, one who delivers to him goods parts entirely with his possession and control over them, and knows nothing of what takes place during the carriage, while the carrier has possession and control over them, and is supposed to know, or have the means of knowing, what happens to them, and if they are lost or injured, how it occurred. The common law recognized the danger of collusion, connivance, and fraud between the carrier and his servants or others, which might leave the owner practically at the mercy of the carrier if he was required to prove negligence or fraud. To make such proof he would ordinarily have to call the very men whose recklessness or frailty caused the injury. To prevent this the law excused the carrier only upon his proving that the loss or damage occurred from the act of God or the public enemy,—causes for which he could not be supposed to be responsible. The reasons which require the carrier to excuse himself for his failure apply with as much force to a case of limited as to a case of full common-law liability. Order affirmed.

Stipulations against Liability for Negligence.—See *Alabama G. S. R. Co. v. Thomas*, (Ala.) 32 Am. & Eng. R. Cas. 464; *Wallingford v. Columbia & G. R. Co.*, (S. Car.) 30 *Id.* 40; *Carroll v. Missouri Pac. R. Co.*, (Mo.) 26 *Id.* 268; *Sprague v. Missouri Pac. R. Co.*, (Kan.) 23 *Id.* 684; *Wilson v. New York, C. & H. R. R. Co.*, (N. Y.) 21 *Id.* 148, note 150; *Chicago, St. L. & N. O. R. Co. v. Moss*, (Miss.) 21 *Id.* 98; *Little Rock, M. R. & T. R. Co. v. Tal-*

bot, (Ark.) 18 *lb.* 598; Taylor *v.* Little Rock, M. R. & T. R. Co., (Ark.) 18 *lb.* 590; Coup *v.* Wabash, St. L. & P. R. Co., (Mich.) 18 *lb.* 542; Kansas City, St. J. & C. B. R. Co. *v.* Simpson, (Kan.) 16 *lb.* 158; Rintoul *v.* New York, C. & H. R. R. Co., (N. Y.) 16 *lb.* 144; note 149; Canfield *v.* Baltimore & O. R. Co., (N. Y.) 16 *lb.* 152; Alabama G. S. R. Co. *v.* Little, (Ala.) 12 *lb.* 37; Moulton *v.* St. Paul M. & M. R. Co. (Minn.) 12 *lb.* 13; McKinney *v.* Jewett, (N. Y.) 9 *lb.* 209; Nicholas *v.* New York C. & H. R. R. Co., (N. Y.) 9 *lb.* 103; Harvey *v.* Terre Haute & I. R. Co., (Mo.) 6 *lb.* 293; Whitworth *v.* Erie R. Co., (N. Y.) 6 *lb.* 249; Holsapple *v.* Rome, W. & O. R. Co., (N. Y.) 3 *lb.* 487; notes 3 *lb.* 272; 18 *lb.* 612.

Bill of Lading—Stipulation Exempting from Liability for Loss by Fire.—If the bill of lading exempts the carrier from liability for loss by fire, and the goods were formally delivered to the consignee before destruction, but had not been removed from the car, proof of negligence on the part of the carrier is necessary to charge him with liability, whether as a common carrier or as a warehouseman. *St. Louis, I. M. & S. R. Co., v. Bone, Ark. Sup. Ct., June 22, 1889.*

AYRES *et al.*

v.

CHICAGO & NORTHWESTERN R. CO.

(*Wisconsin Supreme Court, December 3, 1889.*)

Carriage of Goods—Delay—Loss of Market—Damages.—By the failure of the company to furnish cars, live-stock, instead of reaching market in time for sale on Thursday, only arrived in time for Saturday's market. The plaintiff could not effect a sale on Saturday, and on Monday only sold part of the lot. The remainder were sold on Tuesday and Wednesday. *Held*, that the measure of plaintiff's recovery was the expense of keeping, shrinkage in weight, and depreciation in value, from Thursday to Monday only and not to the date of actual sale.

Same—Inability to Effect Sale.—There being evidence that no sale could be effected on Saturday, the jury were properly instructed that the plaintiff was entitled to recover any further depreciation in value which took place between Saturday and Monday, as well as the cost of keeping and shrinkage, if any, up to the latter date.

Same—Inability of Company to Furnish Cars—Evidence.—A railroad company is presumed to be able to furnish the cars necessary for the transportation of freight, and where it does not appear that the train despatcher or station agent was conversant with the general resources of the company, his testimony is inadmissible for the purpose of proving the inability of the company to furnish transportation at the proper time.

APPEAL from Circuit Court, Sauk County.

Winkler, Flanders, Smith, Bottum & Vilas for appellant.

G. Stevens for respondents.

TAYLOR, J.—This is the third appearance of this case in this court. It first came up on a motion on the part of the defendant to make the complaint more definite and certain, and the case is reported in 58 Wis. 537, 16 Case stated. Am. & Eng. R. Cas. 171. It came up again after a trial and judgment in favor of the plaintiff, and is again reported in 71 Wis. 372, 35 Am. & Eng. R. Cas. 679. On the second appeal, this court reversed the judgment in favor of the plaintiffs, for the reason that a wrong rule for the assessment of damages was adopted on the trial. As the case then stood, it appeared, as it does on the present appeal, that the two car-loads of hogs for which the plaintiffs claim to recover damages because of the failure of the railway company to furnish cars for their transportation at the time agreed upon, arrived in the Chicago market on Friday afternoon, not in time to be sold that day, but in time to be put on the market on Saturday, and that, if the company had furnished transportation on the day agreed upon, they would have arrived in time for the previous Thursday's market. This court then held, upon the evidence produced on that trial, that the plaintiffs' damages were "necessarily limited to the recovery of the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday;" and, because the trial court refused so to limit the recovery to the damages which had accrued between Thursday and Saturday, and left the jury at liberty to include such damages down to the next Monday, this court reversed the judgment, and ordered a new trial. The case has been again tried, and a verdict has again been found in favor of the plaintiffs, and the defendant again appeals, and alleges for error that upon the last trial the court not only did not limit the plaintiffs to a recovery for shrinkage, depreciation in value, and expense for keeping from Thursday until Saturday, but allowed them to recover for such depreciation and expense of keeping of all the hogs until Monday, and of a part of them until Tuesday and Wednesday, of the following week.

Upon the evidence in this case, we think the learned circuit judge was justified in submitting the question, as he did, to the jury, whether it was possible for the plaintiffs to make sale of the hogs in the Chicago market on Saturday; and if they found, as we supposed they must have found, under the instructions of the court, that the hogs could not be sold on Saturday, then the plaintiff must necessarily keep them for the Monday's market, and if any further depreciation in value took place between Saturday and Monday, the plaintiff could recover such further depreciation as damages, as well as the cost of keeping and the shrinkage, if any, up to that date. The evidence

Loss of market—Damages.

upon which the learned judge submitted this question to the jury was, we think, sufficient to sustain the verdict of the jury that no sale of the hogs could have been made on Saturday, at any fair price. The evidence shows that Saturday is ordinarily not a good market day, and at this particular time the market was demoralized by a sudden fall in the price of hogs, commencing on Thursday and continuing for several days. The evidence also tends strongly to show that the plaintiffs made all reasonable efforts to sell the hogs on Saturday, and, although they offered them at 25 cents per 100 below the quoted market price, they could get no offer for them. The evidence tended strongly to show that on Saturday no hogs were sold except those of the first grade; that the plaintiffs' hogs were not first grade hogs; and that an unusually large number of hogs remained on hand and unsold on Saturday evening. Upon this evidence, we think the jury were justified in finding that there was no market for the hogs in question, and that they could not be sold on Saturday. The learned circuit judge instructed the jury that the plaintiff's damages, if any, must be measured by the market value of the hogs on Saturday, and not on Monday, unless they should find that the market was so demoralized that there was in fact no market value, or any market value at which the hogs could have been sold, on Saturday. The latter part of this instruction was given in several forms, and was excepted to by the defendant. These exceptions, we think, were properly overruled.

No question was submitted to the jury as to whether the hogs could all have been sold on Monday. In fact, the agent of the plaintiffs sold two car loads of hogs for plaintiffs on that day. Whether the hogs sold on Monday were all hogs that came in the two cars which arrived in Chicago on Friday night, or were the hogs which came in the two cars that arrived on time on Thursday, or whether they were portions of all the four car loads, does not appear from the evidence. The probability is that they were about equally distributed between all the cars, as they appear to have been the heaviest hogs in the whole lot. Under this state of the evidence, it would seem quite clear that the plaintiffs should have been limited, according to the rule stated on the former appeal, in their recovery of damages to the depreciation in value, or rather the difference in the value, of the hogs in the Chicago market on Thursday of the previous week and on Monday, when they could have been sold. Instead of this rule being adopted, the learned circuit judge instructed the jury that if they found that the hogs could not be sold on Saturday, then the measure of the damages would be the depreciation be-

tween the time when they should have arrived and the time they were in fact sold. This idea was stated by the learned judge in different ways, and was duly excepted to by the defendant at each time. The evidence shows that the market price for hogs, as well as their actual value, on Tuesday and Wednesday was considerably lower than on Monday. The actual sales of these hogs made on Monday were for \$6.78, on Tuesday \$5.81, and on Wednesday, for \$6.48. The lower sales on Tuesday and Wednesday were in part attributed to the decline in the market, and perhaps in part to the fact that the hogs sold on Monday were heavier, and therefore somewhat more valuable. To be consistent with our former rulings in this case, we must hold that this instruction was erroneous, and gave the jury a wrong rule for estimating the damages, because: *First*, the depreciation should have been limited by the difference in value of the hogs on Thursday and Monday, and not the difference in value at the time they were sold, on Tuesday and Wednesday; and, *second*, because the price for which they were in fact sold was not the absolute rule for determining their value on the days they were sold. It was evidence of their value at the time of sale, but not conclusive evidence. See 2 Suth. Dam. 374, 376; Kountz v. Kirkpatrick, 72 Pa. St. 376, 378; Muller v. Eno, 14 N. Y. 597.

The defendant moved to set aside the verdict on the ground, among others, that the damages assessed by the jury were excessive. We think the verdict should have been set aside for that reason. By computing the difference in value of the hogs on Thursday, taking the average price on that day, as shown by the evidence, and the prices at which the same were in fact sold for, such difference would be \$369.50. Adding to that the value of 10 pounds shrinkage on each hog, which is the shrinkage as shown by the evidence, computing the shrinkage at the average value on Thursday, it would make \$110.96, which, added to the \$369.50, would make \$480.46, instead of \$512.73, as found by the jury. This estimate is made upon a supposed value of the grade of hogs of the plaintiffs on Thursday of \$7.66, which, upon all the evidence, seems to us to be the very highest estimate that could reasonably be put upon them on that day. While this overestimate of the depreciation in value by the jury, upon the theory of the case adopted by the trial judge, might not in itself be a sufficient reason for a reversal of the judgment, it shows that in estimating the damages the jury went to the extreme limit in favor of the plaintiffs, upon the theory of the case as submitted to them by the trial judge, so that it cannot be fairly contended that the wrong theory of the case, upon which the jury assessed the damages, was not injurious to the rights of the defendant.

Excessive verdict.

It was also contended by the learned counsel for the defendant that the trial judge erred in rejecting certain testimony offered by the defendant, which, it is insisted, was competent upon the question of the ability of the company to furnish the cars at the time they were promised to be furnished. The proposition of the defendant was to show, by the station agent where the cars were to be furnished and by the train dispatcher of the division in which such station was situated, that the cars of the company were so situated and employed at the time that by the use of reasonable efforts on its part it could not furnish the cars at the time and place agreed upon. The learned circuit judge permitted the train dispatcher to give evidence tending to show that there were no cars in his division which could be furnished, but excluded his testimony as to the ability of the company to furnish the cars from other places. The following questions were put to the station agent: "What is the fact in respect to the ability of the company that fail to furnish stock cars?" "State whether or not there was any scarcity of stock cars at that time on the road." These questions were objected to by the plaintiffs, and the witness was not permitted to answer. The learned circuit judge rejected the offered evidence on the ground that it was not shown that the witness had any knowledge on the subject. Similar questions were propounded to the train dispatcher of the division in which La Valle is situated, and were excluded for the same reason. We think these questions were properly excluded. Neither the agent at La Valle nor the train dispatcher of the division could have any knowledge of the ability of the company to furnish the cars required, except such as they must have obtained from the general officers of the company; and their evidence would be merely opinions, or evidence of what such general officers had told them, and therefore incompetent, as mere hearsay. The train dispatcher was also asked "whether he was able at that time to obtain stock cars enough for use upon his division to supply the demand." This question was objected to and excluded for the reasons above stated; but he was permitted to state that "there were not, within his division, or elsewhere within his control, stock cars enough to supply the demand on the days they were ordered." This, we think, covered all the ground the witness was competent to testify in relation to. This witness was also asked the following question: "State whether or not cars were furnished, whenever the company had them on this division, as ordered." This was also objected to and excluded for the same reason that the other questions were rejected. The presumption being in favor of the ability of the company

Testimony as to inability to furnish transportation.

to furnish the cars as promised, this presumption could only be overcome by the evidence of some person who had knowledge of the general resources of the company at the time in question. Neither of the witnesses to whom the questions above quoted were propounded were shown to have any such knowledge. Their evidence upon this subject was therefore properly rejected. The only reason we find in the record for reversing the judgment is that the court directed the jury to assess the damages of the plaintiffs upon the difference in value of the hogs on Thursday and the price at which the hogs were in fact sold. The rule should have been the difference in value between Thursday and Monday, in case the jury found there was no market at which they could have been sold on Saturday.

While this court can do nothing but reverse the judgment and order a new trial, we respectfully suggest that as all the important legal questions in the case have been settled, and, as the facts necessary to make a satisfactory computation of the amount of damages the plaintiffs ought to recover under the rules laid down by this court, the parties should agree that the plaintiffs take judgment for the damages they are entitled to recover upon the proofs in the case and the rule stated, without the expenses and trouble of a new trial. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

ERIE DISPATCH

v.

JOHNSON *et al.*

(87 *Tenn.* 490.)

Carriers of Goods—Conversion—Stipulation Limiting Damages.—Although a bill of lading contains a stipulation that in case of loss the measure of damages shall be the value of the goods at the place of shipment, such stipulation does not limit the liability of the carrier for the wrongful conversion of the goods, and he is liable for their value at the place of destination.

Same—What Amounts to Conversion.—If a common carrier negligently delivers freight to a person other than the consignee, and thereafter contracts with that person to sell the goods and hold the proceeds for its account, it is guilty of conversion.

40 A. & E. R. Cas.—8

ERROR to Circuit Court, Shelby County.
H. C. Warinner for plaintiff in error.
Poston & Poston for defendants in error.

CALDWELL, J.—Johnson & Guinee were merchants doing business in the city of Memphis. They purchased a car-load of lemons in the city of New York, and put them in charge of the Erie Dispatch, a common carrier, for transportation to Memphis. This action was brought to recover damages for a failure to deliver the lemons at their destination. Verdict and judgment were for the plaintiffs, and the defendant has brought the case to this court by writ of error and *supersedeas*. The declaration contains two counts—one for breach of contract to deliver the lemons, and the other for conversion. The trial judge charged the jury that the measure of damages was the value of the lemons in the Memphis market at the time they should have been delivered, less the freight. This instruction is assigned as error. Learned counsel for the appellant concedes that the instruction would have been correct, as applied to a case in which there was no agreement between the contracting parties for a different measure of damages, but he insists that there was such an agreement in this case, whereby it is taken out of that rule.

The bill of lading stipulates that the measure of damages in case of loss shall be the value of the lemons in New York at the time of shipment, and the contention of the carrier is that this stipulation constitutes an exception to the rule of law stated by the trial judge, and determines the true criterion for the measure of damages in this case. This position is not tenable under the facts developed in this record.

Though the bill of lading does contain the stipulation just mentioned, that fact could in no event be controlling in this case, because it was clearly shown on the trial that the Dispatch Company had been guilty of a conversion of the lemons by negligently delivering them to a merchant in Louisville, and thereafter contracting with that merchant to sell them, and hold the proceeds for its account, which was done. Without expressing an opinion as to the validity of such a stipulation in the case of an ordinary loss, we hold that it can by no possible intendment or construction apply to a case of conversion by the carrier, as this is. In such a case the carrier will not be allowed to receive any protection or advantage from such stipulation. It cannot be concluded from the language used that such a default by the carrier was in the contemplation of the parties when the contract of shipment was made, or that the stipulation was intended to meet a case like the one

Facts.

Stipulation not applicable to damages for conversion.

here presented. Therefore this case is entirely without and beyond the scope of that stipulation, and is in no sense affected by it. There being no dispute about the facts, which we hold constituted a conversion by the carrier, and the stipulation in question having no application where such a default is shown, the general rule of law as administered in this state must prevail; and it was proper for the trial judge to ignore that stipulation altogether, and give the jury the law applicable to a case where the parties have made no agreement whatever with respect to the measure of damages. The charge is in accord with the rule laid down in *Dean v. Vaccaro*, 2 Head (Tenn.), 489; *Hutch. Carr.* § 769; and 2 Am. & Eng. Encyc. Law, 905, and cases cited. Affirmed.

Conversion—Misdelivery of Goods by Carrier.—See *Forbes v. Boston & L. R. Co.* (Mass.), 9 Am. & Eng. R. Cas. 76; *Jellett v. St. Paul, M. & M. R. Co.* (Minn.), 16 *Id.* 246, note 249; *Nanson v. Jacob* (Mo.), 32 *Id.* 553; *Furman v. Union Pac. R. Co.* (N. Y.), 32 *Id.* 500.

GULF, COLORADO & SANTA FE R. CO.

v.

LEVI.

(*Texas Supreme Court, December 7, 1889.*)

Carriage of Goods—Destruction by Rioters—Liability.—In the absence of any contract limiting the common law liability of a carrier of freight, he is liable for goods destroyed by a mob of rioters under the provision of Tex. Rev. St., art. 277, that "the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law."

COMMISSIONERS' decision. Appeal from District Court, Tarrant County.

Shepard & Miller for appellant.

B. P. Ayres for appellee.

COLLARD, J.—This suit was brought by Will Levi, appellee, against the Gulf, Colorado & Santa Fe Railway Company, to recover the value of a car-load of lemons, shipped by him from New Orleans to Ft. Worth by way of defendant's railroad and its connections. The car was alleged

Case stated.

to have been detained an unreasonable time, by reason of which the lemons were spoiled, and became valueless. Defendant alleged that the delay was unavoidable, having been caused at Temple by reason of the seizure of its trains and depots by a mob of rioters, who, by overwhelming force, prevented the company from carrying the freight; that defendant used strenuous and exhausting efforts to recover its property, and appealed to civil authorities, state, county, and city, for assistance and protection, but such authorities were unable to subdue the mob, and compel the restoration of defendant's property, so that defendant could resume its business and deliver the freight. The court below sustained a demurrer to this answer. The trial resulted in a judgment for the plaintiff for \$650, and defendant appealed, assigning as error the ruling of the court in sustaining the demurrer to the answer.

There was no contract which attempted to limit the common law liability of the defendant as carriers of freight from another state into this state; hence it is to the common law that we must look for the principles governing the case. Rev. St. art. 277. What, then, are the principles governing the case made by defendant's answer? It seems to be well settled that common carriers are insurers of property received by them for transportation, and at common law are liable for all losses, except such as are caused by the act of God, public enemies, the fault of the party, and inherent defect in the property itself. 3 Wood, Ry. Law, § 424.

Rioters are
not public
enemies.

Can it be said that a mob—an assembly of strikers and rioters—are public enemies? We think not. There have been many definitions given of the phrase "public enemy," and it is universally understood to mean some power with whom the government is at open war. Pirates are included because they are at war with all mankind, but thieves, robbers, and insurgents are not. 2 Abb. Law Dict.; Story, Bailm. 338; Cook v. Gourdin, 2 Nott. & McC. (S. Car.), 19; Bouv. Law Dict. term, "Public Enemy;" Express Co. v. Womack, 1 Heisk. (Tenn.), 256.

At an early day our court declared the law upon the subject, as understood in this state, in the case of *Chevallier v.*

Liability of
carrier.

Strahan, 2 Tex. 122, from which we extract the following: "What, then," the court asks, "are the responsibilities of a common carrier? He is liable for all losses except such as may arise from the act of God or the enemies of the country or the fault of the party complaining. [Citing *Dusas v. Murgatroyd*, 1 Wash. (C. C.), 13-17; *Smyrl v. Niolon*, 2 Bailey (S. Car.), 422; 2 Kent. Comm. 597; *Story, Bailm.* 330.] He is an insurer against all losses not

embraced in the excepted cases. As is well expressed in the dissenting opinion of Mr. Justice NOTT, in *Cook v. Gourdin*, 2 Nott & McC. (S. Car.), 19: 'No force, however great, no accident, however inevitable, no fraud, however beyond his control, will excuse him.' He is liable, not only for losses occasioned by secret theft or embezzlement, but for those inflicted by highway robbery, by the spoliations and outrages of mobs, rioters, and insurgents. The most resistless and destructive conflagration, if occasioned by human agency, without any negligence whatever on the part of the carrier, will furnish no valid ground of exemption. Story, Bailm. 338." In commenting upon the doctrines of the foregoing case in *Philleo v. Sanford*, 17 Tex. 231, our supreme court said: "It is unnecessary to repeat here the doctrines of that opinion. They are as clearly and firmly settled by the uninterrupted current of decisions in the English and American courts as any principles of the law can be. They are not to be overturned or shaken by anything short of legislation." We see no reason why this doctrine should not be upheld in the present state of affairs.

Riots and mobs growing out of "strikes" or other causes may become more common, and may more often interfere with the carrier's business, and on that account the risk of such interference may be more certainly incurred by the carrier; but this can be no reason for changing the principle of liability. The law puts the risk upon the common carrier, and not upon the shipper, and in this state, at least, it must remain there until the legislature relieves against it in favor of the carrier. The character of our legislation, and the tone of our decisions, indicate that the principle and policy of the law as it has been before announced should be sustained, and that the risks of carriage by public carriers should not be transferred from the carrier to the public except in cases already named. Our statute will not allow a contract which is to be wholly performed within this state to relieve the carrier of his common law liability. Rev. St. art. 278. The courts of some of the states have relaxed the strict common law principle of liability, so that a strike of the company's employees, who abandon their employment, and by force prevent a railway company from using its road and carrying on its business, will excuse the company for loss by detention of goods so caused. *Greismer v. Lake Shore & M. S. R. Co.*, 102 N. Y. 563, 26 Am. & Eng. R. Cas. 287; *Pittsburgh C. & St. L. R. Co. v. Hollowell*, 65 Ind. 188; *Lake Shore & M. S. R. Co. v. Bennett* (Ind.), 6 Am. & Eng. R. Cas. 391; *Pittsburgh, Ft. W. & C. R. Co. v. Hazen*, 84 Ill. 36. In this state we are bound to hold

Responsibility of carrier for destruction by mob.

to the common law principle. Our legislature has so declared, (Rev. St. art. 277,) and we are not at liberty to go beyond it. We are not disposed to find fault with the common law, as it has been defined and announced in this state by our courts in reference to this subject; but, if we should desire a modification or a change in favor of carriers, it must come from the legislature, and not from the courts. Finding no error in the ruling of the court below in sustaining the demurrers to defendant's special answer, our conclusion is the judgment of the court should be affirmed.

STAYTON, C. J.—Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

Responsibility of Carrier for Destruction or Delay Caused by Mob.—See *Sherman v. Pennsylvania R. Co.* (C. C.), 3 Am. & Eng. R. Cas. 274; *Bartlett v. Pittsburgh C. & St. L. R. Co.* (Ind.), 18 *Ib.* 549, note 557; *Lake Shore & M. S. R. Co. v. Bennett* (Ind.), 6 *Ib.* 391, note 403; *Haas v. Kansas City Ft. S. & G. R. Co.* (Ga.), 35 *Ib.* 572, note 575; *Greismer v. Lake Shore & M. S. R. Co.* (N. Y.), 26 *Ib.* 287, note 9 *Ib.* 13.

BASSETT

v.

CONNECTICUT RIVER R. CO.

(*Massachusetts Supreme Judicial Court, November 27, 1889.*)

Carriage of Goods—Res Adjudicata—Loss by Fire.—Where the owner of property which was destroyed by fire whilst in the possession of a carrier, brought an action the complaint in which contained counts founded not only upon Mass. Pub. St., chap. 112, § 214, which provides that a railroad corporation shall be responsible for property injured by fire communicated by its locomotive engines, but also upon the alleged negligence of the carrier, and such action was dismissed on the ground that the statute did not apply to goods destroyed by fire while in the possession of a railroad company under a contract of carriage, and no evidence was introduced in it as to the negligence of the company, the judgment in that action is a bar to a second suit founded solely upon the alleged negligence of the carrier.

ON exceptions from Superior Court, Hampden County.

Action by Henry L. Bassett against the Connecticut River R. Co. to recover damages for the loss of certain goods be-

longing to the plaintiff which were destroyed by fire whilst stored in the defendant's warehouse. The declaration was in the following terms: "*First count.* The plaintiff says the defendant is a common carrier, and transporting over its railroad certain goods and chattels belonging to the plaintiff, and agreed to store the same in a reasonably safe warehouse, and take reasonable care of the same; and the plaintiff says the defendant did not store the same in a warehouse which was reasonably safe, and did not take reasonable care to guard and protect the same; and by reason of such failure of the defendant to keep its said agreements, the plaintiff's goods and chattels were lost and destroyed by fire. *Second count.* And the plaintiff says the defendant is a common carrier, and transported certain goods and chattels belonging to the plaintiff to Chicopee, and negligently deposited the same in an unsafe warehouse, and neglected to give the same proper care and attention, and by reason of such negligence on the part of the defendant the said goods and chattels were lost and destroyed by fire." Both counts were founded upon the same cause of action. The defendant pleaded in defense a judgment in a former suit which sought for the same relief as the present action. In the former suit the following facts have been submitted to the court under an agreed statement: The defendant owned and operated a railroad in this State, and on March 30, 1887, its freight depot at Chicopee was destroyed by fire. The fire originated at 12 M., and was caused by sparks from the defendant's locomotive, which set fire to bales of cotton which stood on the platform of said depot. The fire communicated directly to the said building, which was destroyed, with its contents, including the plaintiff's goods, which consisted of numerous articles of household furniture and clothing for himself and family. The property of the plaintiff was placed on the cars at Providence, Rhode Island, for transportation to Chicopee, where the plaintiff had gone to live, and the goods were all properly packed in 77 different packages, and carefully covered. The said goods arrived at Chicopee all right, on March 26, 1887, and were taken from the cars on the afternoon of said day, and placed in said freight depot, where they remained until the building and goods were destroyed by fire on March 30, 1887. It was further agreed that some time during the day on which the goods arrived at Chicopee a teamster, not in the employ of the defendant, nor under the direction or control of its agent at Chicopee, nor at his suggestion or request, told the plaintiff that some goods had arrived directed to him, and solicited the job of teaming them "whenever the plaintiff was ready to have them removed," that all these goods arrived at one

time, and plaintiff had no other goods in course of transportation for Chicopee; that plaintiff had no other information of the arrival of the goods, and was not asked to remove the same. The declaration in the first action was in the following terms: "*First.* The plaintiff says the defendant is a corporation operating a railroad within this commonwealth, and on the 30th day of March last, at Chicopee, in said county, certain goods and chattels belonging to the plaintiff were destroyed by fire, communicated thereto by the defendant's locomotive engines, to the great damage of the plaintiff. *Second.* And the plaintiff further says the defendant received for storage certain goods and chattels belonging to the plaintiff, and the defendant agreed to use reasonable care in providing a storehouse in which to keep the same, and in storing, keeping, and protecting them. And the plaintiff says the defendant did not use reasonable care in storing, keeping and protecting such goods and chattels, and did not provide a suitable warehouse in which to store the same; but, on the contrary, the defendant stored the same in an unsafe place, and in a building wholly unfit for such storage, and because of the failure of the defendant to use reasonable care in reference to the storage of said goods, and in providing a suitable storehouse, and by reason of the defendant's negligence therein, the said goods and chattels were wholly destroyed by fire, to the great damage of the plaintiff." The defendant denied the allegations of the declaration and alleged negligence on the part of the plaintiff. The parties agreed to submit the case on an agreed statement of facts, which set forth the facts above stated, and judgment was entered for the defendant. The superior court having ruled that the judgment in the first action was a bar to the present one, the plaintiff excepted.

Luther White for plaintiff.

Wells & Barnes for defendant.

MORTON, C. J.—The principles which govern this case are well stated in *Foye v. Patch*, 132 Mass. 105, 110. A former judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action, for the same cause of action, between the same parties. The parties are concluded by the judgment, not only upon all the issues which were actually tried, but upon all issues which might have been tried in the former action; so that a new action for the same cause of action, between the same parties cannot be maintained, on grounds which might have been tried and determined in the former action. In the case at bar the parties and the cause of action are the same as in the suit of

Doctrine of
res adjudicata.

Bassett v. Connecticut R. R. Co., reported in 145 Mass. 129, 32 Am. & Eng. R. Cas. 528. In each suit the cause of action is the loss by fire of the plaintiff's goods while in the warehouse of the defendant. The second count of the declaration in the former suit is in legal effect the same as each of the counts in the present suit. It charges the defendant with negligence in keeping the goods in its warehouse. The fact that the plaintiff, either by his laches or misfortune, failed to prove any negligence, and chose to rest his case solely upon the liability of the defendant under Pub. St., chap. 112, § 214, is immaterial. The question of negligence was one of the issues involved in the case. He then had his day in court to prove this issue. It might and ought to have been tried in that case. If his proof had shown negligence, he would have been entitled to judgment on that ground. Having failed to show negligence, a judgment against him is a bar to any future action for the same cause of action. *Interest reipublice ut finis sit litium*. The superior court correctly ruled that the former judgment is a bar to this suit. *Biglow v. Winsor*, 1 Gray (Mass.), 299; *Spaulding v. Arlington*, 126 Mass. 492. Judgment for defendant.

NORFOLK SOUTHERN R. CO.

v.

BARNES.

(*North Carolina Supreme Court, October 14, 1889.*)

Carrier of Goods—Wrongful Delivery to Consignee—Liability of Bona Fide Purchasers.—If a carrier by whom goods have been shipped to be delivered to the consignee upon payment of the purchase money, negligently permits the consignee to obtain possession of the goods without payment of the price, he cannot recover them from a *bona fide* purchaser of the consignee for value and without notice.

APPEAL from Supreme Court, Hertford County.

W. D. Pruden for appellant.

Winborne & Bro. for respondent.

SHEPHERD, J.—A. sells goods to B. and ships them by a

common carrier, to be delivered to B. upon the payment of the purchase money. By the negligence of the carrier B. obtains possession of the goods without paying the money, and sells them to C., a *bona fide* purchaser for value, and without notice. Can A. or his bailee, the carrier, recover the goods from C.? This construction of the case upon appeal was conceded by the appellee, and is the most favorable to the plaintiff that can be made; for we think it very clear that if the plaintiff was holding the goods only for the payment of its freight charges, its lien could not be enforced against the innocent purchaser.

As soon as the goods were delivered to the carrier the right of property passed to the vendee, but the right of possession remained in the vendor until the price was paid. *Ober v. Smith*, 78 N. Car. 313; *Benj. Sales*, 260. This possession he lost by the negligence of his agent, and we are of the opinion that he should not be permitted to recover against the defendant, who bought of the vendee in possession, for value, and without notice. Of course, if the vendor could not recover, his negligent agent, the plaintiff, can have no cause of action. We think this case falls within the principle declared in *Wilmington & W. R. Co. v. Kitchin*, 91 N. C. 39,—“that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct make it possible for the loss to occur, must bear the loss. This doctrine is recognized in *State v. Lewis*, 73 N. Car. 138; *Vass v. Riddick*, 89 N. Car. 6; *State v. Peck*, 53 Me. 284; and in *Hern v. Nichols*, 1 Salk. 289.” Had this been a conditional sale before the recent statute, an executory contract to sell, an ordinary bailment, or any other transaction which failed to pass the title, the innocent purchaser, however much he may have been misled by the possession and the apparent ownership of his vendor, would not be protected. *Ballard v. Burgett*, Langd. Cas. Sales, 730.

The case of *Millhisser v. Erdman*, 103 N. C. 292, does not conflict with this view, as it was there held that by the terms of the agreement the title was not to pass until certain conditions were performed. Here the title passed, and a delivery having been made by the negligence of the vendor's agent, the plainest principles of justice forbid a recovery. As to the innocent purchaser the right of property and the right of possession are united, and his title is therefore complete. No error.

Effect of surrender of possession to consignee.

GEORGIA RAILROAD & BANKING CO.

v.

SMITH.

(Georgia Supreme Court. Nov. 11, 1889.)

Connecting Carriers.—Contract for Carriage of Goods—Authority of Contracting Carrier.—Where the chief pressure of the case was upon the question whether the defendant, in consenting to, and authorizing, a given contract made with the consignee by the plaintiff in behalf of both carriers, for the transportation of certain freights, at a special reduced rate, over their respective railways, as a connected and continuous line, acted upon information derived from the plaintiff that the contract was, or was to be, limited in its performance to a certain portion of the year, a written request by the defendant to the court to charge the jury in appropriate terms (the same being set out in the request) upon that specific question, should have been complied with. The instructions should have been given in the language requested, or in language substantially equivalent thereto.

Same.—Contract by Correspondence—Repetition of Condition.—If the terms of a contract between two railways be agreed upon by correspondence, a limitation or condition inserted in one or more of the communications need not be repeated or referred to in subsequent ones, in order to preserve its force.

Same.—Lost Writings—Evidence.—When some of the writings fixing the terms of a contract are lost, testimony as to how the parties themselves interpreted, acted on, and treated the contract while the business was in progress, may be looked to, in connection with other evidence, to ascertain its terms and meaning.

Same.—Recovery of Overcharges—Pleading.—The declaration being for the recovery of overcharges paid the defendants on shipments to Dalton only, the same should be amended in order to recover for overcharges paid on shipments to Rome also, if both sets of overcharges be embraced in the amount sued for. The *allegata* and *probata* in descriptive matters ought to correspond.

Same.—Payment by Mistake—Interest.—The general rule is, that on money paid by mistake, where there is no fraud or misconduct by the party receiving it, interest does not run until after demand. Prior to demand, by suit or otherwise, the receiver is in no default.

Prima Facie Evidence—Rebuttal.—*Prima facie* evidence is such evidence as, in judgment of law, is sufficient, and if not rebutted, remains sufficient. It may be rebutted by developing additional facts consistent with its truth, but tending to an opposite conclusion, or by proving it untrue or untrustworthy in whole or in some material part.

Same.—Books of State Railroad—Rebuttal.—The books of the Western & Atlantic Railroad, though made by statute *prima facie* evidence, may be rebutted or discredited as to particular entries by internal or external evidence of falsity or error.

ERROR from Superior Court, Fulton County.

Hullyer & Bro. for plaintiff in error.

C. Anderson, Atty. Gen., and N. J. Hammond for defendant in error.

BLECKLEY, C. J.—In 1874, the state, as owner of the Western & Atlantic Railroad, brought suit in the name of the governor against the Georgia Railroad & Banking Company, for \$3,263.40, principal, besides interest, alleged overcharges by the latter, paid to it by the former, on iron consigned to another railroad company, the Selma, Rome & Dalton. All the iron, the subject-matter of the overcharges sued for, was shipped from Charleston, most or all of it to Dalton, the residue, if any, to Rome, and passed, first over the South Carolina, then over the Georgia, and then over the state railroad. So much of it, if any, as went to Rome passed also over the Rome Railroad which connects with the state road at Kingston. The declaration alleges that it all went or was consigned to Dalton, and makes no mention of or reference to Rome or the Rome Railroad. The overcharged iron, if indeed any of it was overcharged, was preceded by some which was not overcharged, but was carried at a special reduced rate, to which all the carriers concerned assented, the contract with the consignee for that rate being made by the authorities of the state road, but not closed until the other members of the line, or persons authorized to represent them, had been consulted. This contract as finally agreed upon, was made in July, 1869, and there is no dispute that iron was carried under it, and at a rate conforming to its terms, from August, in which month the transportation began, until the last of November, when shipments ceased, until the following January. From January to June, both inclusive, when the transportation of the iron was concluded, all the carriers concerned charged at an increased rate, the increase being caused, or at least suggested, by a communication by letter or telegram from the state road to the Georgia road, dated in December. The state road credited the Georgia road on its books with the share of the latter road in the freights on all the iron, and the result was that in current settlements the latter road realized the whole of its share of freights produced by the increased rate. But the consignee refused to pay the state road for any part of the line at that rate on the iron consigned to Dalton, insisting on settling upon the basis of the low special rate, and to this demand the state road yielded in November, 1870. Whether the consignee took the same stand as to the iron consigned to Rome is not quite certain, but if not, and if the increased rate on that part of the iron was paid by the consignee either to the Rome road or to the

state road, the evidence indicates that the excess over the low special rate was refunded by the latter road. So that the whole sum sued for in this action, besides its own share of the overcharges, was lost to the state road, either by forbearing to collect any of it from the consignee, or by so forbearing as to the greater part, and refunding the balance after having collected such balance. Whether the state can recover the money sued for from the Georgia Railroad & Banking Company, to whom it was paid by the state road in current settlements, depends somewhat on several scarcely doubtful questions, on which the court charged the jury correctly, but chiefly on the doubtful question, under the evidence, whether, as between the state road and the Georgia road, the contract of July, 1869, was limited in the time of performance to the summer months or to the summer and autumn months of the year in which it was made, or whether it was without limit as to time, so that it embraced not only the shipments which came forward from August to November, 1869, but also those of January and June, and the intervening months of 1870. That the contract actually made with the consignee by the state road in behalf of all the carriers was without any time limit is rendered probable by the evidence. That the contract bound the Georgia road, relatively to the consignee, is also probable, for it is shown that the agent of the consignee saw, at the time of closing the contract, a dispatch from the superintendent of the latter road to an officer or agent of the former, saying to close the contract, which dispatch was silent on the element of time, and such a dispatch was in fact sent. The agent had a right to rely, and it may be presumed did rely, upon this dispatch as authority from the Georgia road to the state road to represent it in making such terms as had been agreed upon, or were then agreed upon, by and between himself, in behalf of his principal, and the state road, in behalf of the whole line, the Georgia road included.

1. It thus appears that in order to reach and decide the merits of the present controversy it is indispensable that it be ascertained whether, assuming the contract with the consignee to have been without a time limit, the state road acted with or without the consent of the Georgia road in omitting to impose that limit. If the state road, in proposing a contract to the Georgia road, and inviting its consent thereto, named terms, including a time limit, and then closed a contract with the consignee comprehending no such limit, the Georgia road would clearly have the right to stand relatively to the state road, on the same footing as if the time limit agreed upon

Authority to
make con-
tract—in-
struction.

between the two roads had been put into the contract made by the state road with the consignee. To meet this aspect of the case counsel for the Georgia road requested the court to charge the jury (tenth ground of the motion for a new trial) as follows: "Even though the jury should find, under the evidence, that the W. & A. R. R. made the contract alleged, and so agreed or promised 'as to bind itself to transport the 4,300 tons of iron and spikes, without limit in time to the summer and autumn, still, if as between them and the officers of the Georgia Railroad Company the understanding was that the transportation of iron was to take place during the summer and autumn, and the Georgia Railroad Company assented to the rate upon such understanding on its part, the plaintiff cannot recover." This request was pertinent and appropriate. It hit the case at the precise point on which the greatest strain of the facts rested. Nor is any adequate substitute for its terms to be found in the charge as given. On the contrary, that charge, in putting the case hypothetically to the jury, dealt only with the contract actually made with the consignee, and not at all with the one which ought to have been made, as tested by the agreement and understanding between the state road and the Georgia road. The dispatch or dispatches from the former road to the latter, which preceded the responsive dispatch authorizing the contract with the consignee to be closed, are lost. Whether they embraced a time limit is disputed, but there is parol evidence on the subject tending strongly to establish the affirmative. If the truth of the case is correctly rendered by that evidence, the state road, though it may have had authority which bound the Georgia road to the consignee to carry at the reduced rate without regard to time, had no such authority as would create a like obligation as between the two roads. If an agent has private instructions from his principal, and yet violates them in dealing with third persons, the rights of these latter against the principal will not be the measure of the rights of the agent against him in settling up the transaction. The refusal of the court to charge in the language of the request above quoted, or in language substantially equivalent to the same, was error, manifest and material.

2. The request to charge, set out in the eighteenth ground of the motion, should also have been acceded to; that is, "if the contract be alleged to have occurred by letter or telegram, and if, in any or either of the communications on the subject, the limitation or condition was inserted it would not be necessary to repeat or again refer to such condition or limitation in every subsequent letter between the parties in order

Correspondence—Repetition of condition.

to preserve its force. If the alleged condition or limitation existed, and was so understood between the parties in point of fact, it should be regarded and enforced as part of the contract, whether again repeated or alluded to in other or subsequent letters or telegrams or not." Several telegrams and one or more letters touching the contract in question were sent by the superintendent of the Georgia Railroad which were silent as to any time element. One of these was the telegram above referred to, giving authority and instructions to close the contract. The silence of all of these documents upon the element of time is strongly suggestive of the theory that in the contemplation of the writers time was not of the essence of the agreement between the two roads; yet it is true, as the request to charge lays it down, that, if in any or either of the communications on the subject a limitation or condition was inserted, it would not be necessary to repeat or again refer to such limitation or condition in every subsequent letter between the parties, in order to preserve its force. Thus, if in the lost telegrams, or any of them, from the state road to the Georgia road, the condition or limitation was inserted, and in point of fact the authorities of the two roads understood the limitation or condition as forming a part of the contemplated contract, the silence of any or all the subsequent communications on the subject would not displace or defeat the time element; in other words, the silence of the subsequent communications could be regarded by the jury as tending to show what sort of a contract the Georgia road authorized the state road to make in its behalf; but the jury could not rightfully treat such silence as defeating the condition or limitation, which, by an agreement of the two roads, was to be part of the terms of the contract that one of these authorized the other to make with the consignee.

3. Both these roads actually treated the agreement between themselves, and also that made with the consignee, as having expired with the autumn of 1869, or with the month of November in that year; and the suggestion to change from a lower to a higher rate came from the state road. It was in the acting on this suggestion that the alleged overcharges now sought to be recovered were assessed. Both roads assessed at the increased rate for all transportation of the iron effected after November, 1869. On this state of facts, one or more of the material telegrams relative to the contract being lost, the charge requested, as set out in the nineteenth ground of the motion, should have been given, to-wit, that "any testimony as to how the parties themselves interpreted the contract, and how they acted on it and treated it at the time, and whilst the

Evidence—Interpretation adopted by contracting parties.

business was in progress, may be looked to along with other evidence to ascertain what the true terms of the contract or contracts were, and what was the true meaning of the same."

4. The thirty-ninth ground of the motion complains that a part of the recovery was for overcharges upon iron which went to Rome. Some of the evidence, such as the receipt given by Barney, tends to show that this was true, while other parts of the evidence, such as the credit entered on the books of the state road to the Dalton agency, under date of December 31, 1870, would seem to indicate that the Georgia Railroad's proportion of the overcharges on iron which went to Dalton was remitted by the state road, up to the amount declared for and found by the jury. As the declaration now stands, any recovery had upon it should be limited to overcharges on the Dalton iron; and if overcharges on the Rome iron were also included in the amount sued for, the declaration should be amended so as to set forth that fact, and so as to make the *allegata* and *probata* correspond.

5. Under the evidence in the record, any allowance of interest prior to demand would be improper. The overcharges complained of, if made wrongfully by the Georgia road, were not only with the consent, but at the suggestions, of the state road; and, so far as appears, the Georgia road was entirely free from any fraud or fault relatively to the state road in the making of them, and taking credit for them in current settlements. The most that can be said is that these credits were given and taken by mutual mistake, and the general rule touching money paid by mistake is that, prior to demand by suit or otherwise, the recipient is in no default, and therefore is not chargeable with interest. *Jacobs v. Adams*, 1 Dall (U. S.), 52; *Simons v. Walter*, 1 McCord, (S. C.) 97; *Brown v. Campbell*, 1 Serg. & R. (Pa.) 176; *King v. Diehl*, 9 Serg. & R. (Pa.) 409; 2 Story Cont. (by Bigelow) § 1491; *Selleck v. French* (notes), 1 Amer. Lead. Cas. 521. See, also, for analogous cases, *Glass Co. v. Boston*, 4 Metc. (Mass.) 181; *Wood v. Gray*, 5 B. Mon. (Ky.) 92; *Sharp v. Pike*, *Id.* 155. In *Riggins v. Brown*, 12 Ga. 271, (head-note 8), a surety, who, without knowing it, had been discharged by the creditor, and after such discharge had paid the debt, was allowed, in reclaiming the money, to recover interest upon it. There the act of discharge was one in which the surety did not participate, and of which the creditor had knowledge and the surety was ignorant. The creditor could therefore be considered as in fault for receiving the money without making the surety aware that he, the creditor, had done an act which relieved the surety from obliga-

tion to pay the debt. We see nothing in the evidence before us to make that case applicable to the present one on the element of interest. Whether, under the evidence in the record, the demand should be considered as dating with the commencement of the action, or from something done previously thereto, we need not consider.

6. The court charged the jury (forty-fifth ground of the motion for a new trial) that "*prima facie* evidence is that which is to be taken as true until the contrary is shown by other evidence." We think a more accurate definition or description would be that it is such evidence as in judgment of law is sufficient, and, if not rebutted, remains sufficient. *U. S. v. Wiggins*, 14 Pet. (U. S.) 334; *Lilienthal v. U. S.*, 97 U. S. 268; *Emmons v. Westfield Bank*, 97 Mass. 230; *Anderson v. State*, 8 Heisk. (Tenn.) 14. Starkie (1 Starkie, Ev. 544) says: "*Prima facie* evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail if it be accredited by the jury, unless it be rebutted, or the contrary proved."

Prima facie
evidence.

7. By the Code (section 976) the books of the Western & Atlantic Railroad were made *prima facie* evidence of what they contain pertinent to the points in issue. The contents of some of these books were introduced in evidence by the state on the trial of the present case. While we think they were admissible, notwithstanding the lease of the road made by the state to other parties had taken effect when some of the entries in the books were made, yet, considering that the entries were made somewhat irregularly, and after the cessation of active business by the state as a carrier, and that the person or persons who made the entries, or some of them, were not those who had charge of the books when such active business was in progress, the request set out in the twenty-seventh ground of the motion should have been given in charge to the jury, namely, that "plaintiff's books were introduced as only *prima facie* evidence, and were subject to be rebutted either by internal evidence of what the books themselves contained, or by other facts and circumstances. If the jury find that the books were loosely or inaccurately kept, this should be weighed in rebuttal of them. If the jury find that the facts upon which the entries in such books purported to have been made did not justify such entries, the books should be discredited." Perhaps the last sentence is not sufficiently limited to be altogether accurate in expression, because the books should not be discredited though the facts did not justify certain entries, unless the entries in question were material to the merits of the present case.

Same—Re-
buttal.

This, however, we think is implied, as that was the class of entries under investigation. The fact that the books were made evidence by the statute, unless they had been declared conclusive evidence, would not hinder them from being rebutted or discredited from internal or external sources.

We have selected from the almost half a hundred grounds in the motion for a new trial all which we deem material to be discussed separately and specifically in this opinion. For various reasons, or, rather, for numerous reasons,—some of them applying to one ground and some to another,—we think that between 30 and 40 of the grounds are free from error. Indeed, all set forth in the motion may be considered as overruled by us except those in which we have pointed out error in the foregoing part of this opinion. The movant, however, was entitled to a new trial, and the court erred in not granting the same.

Judgment reversed.

ATLANTA & WEST POINT R. Co.

v.

TEXAS GRATE CO.

(81 Ga. 602.)

Carriage of Goods—Failure to Deliver—Pleading and Proof.—A declaration by a corporation against a common carrier, alleging an alternative contract to deliver to the plaintiff, or H. M. Beaty & Co. for the plaintiff, is not supported by proof of a contract to deliver to and for H. M. Beaty & Co. Nor does such proof support the more loose allegation of a contract to deliver generally for the plaintiff, without specifying to whom.

Same—Consignee's Agency for Shipper.—That H. M. Beaty & Co., the consignees, were agents of the corporation, though their agency was not disclosed to the consignor or the carrier, would entitle the corporation to take the benefit of the contract, and sue upon it in the corporate name, but would not dispense with correctly pleading the undertaking to deliver which was actually entered into, or with proving the same as pleaded. The terms of the contract would not be changed by the element of agency; that element would only vary the legal consequences in respect to parties.

Same—Evidence.—Where the testimony (all of it introduced by the plaintiff) can be made consistent by construing the word "We" as meaning H. M. Beaty & Co., but cannot be so harmonized if construed to mean a corporation of which H. M. Beaty is president, the former construction is the one to be adopted.

Same—Delay—Measure of Damages.—To recover of a common carrier damages for mere delay in performing the contract of carriage, the value of such goods at the place of destination when they ought to have arrived should appear, and also their value when they did arrive: the difference between these values being generally the measure of damages. And to show when they ought to have arrived, the contract being silent, it should appear what length of time was usually required or was reasonably necessary to effect the transit.

Same—Damaged Condition of Goods—Evidence.—Under an allegation in the declaration that some of the grates in question were delivered at destination in a broken and damaged condition, evidence that "the grates" were delivered in that condition, will not justify an inference either that all or any particular number of them were broken and damaged. To base any recovery on this part of the declaration, it ought to appear, approximately at least, how many were so injured, and how much the injury impaired or diminished their value.

Connecting Carriers—Liability for Loss—Through Contract.—A railroad company whose line extends from Atlanta to West Point, Ga., having received at Atlanta goods for shipment, consigned to Dallas, Tex., and having fixed by contract with the consignor, the rate of freight for the whole distance, apportioning a part of the same among these carriers, itself included, to New Orleans, and assessing the balance for the transportation beyond New Orleans, the contract was, *prima facie*, a through contract, and bound the initial company for performance to Dallas, the point of destination. This was so, notwithstanding the named rate was made subject to change without notice, the effect being to limit the agreed special rate to the particular shipments with reference to which the rate was established, but not to allow any change, either along or at the terminus of the route, which would affect these shipments.

ERROR from Superior Court, Fulton County.

Action by the Texas Grate Company against the Atlanta & West Point Railroad Company to recover damages for delay in transporting freight. Defendant appeals from a judgment for the plaintiff.

Bigby & Dorsey and *Calhoun, King & Spaulding* for plaintiff in error.

G. A. Howell, contra.

BLECKLEY, C. J.—1. The declaration, as framed originally, alleges a contract to deliver in the alternative, to the plaintiff, or H. M. Beaty & Co. for the plaintiff. The amendment alleges two contracts to deliver for the plaintiff but without specifying to whom. The evidence wholly fails to establish any contract whatsoever to deliver to the plaintiff or for the plaintiff. The bills of lading designate H. M. Beaty & Co. as consignees; and the evidence of Holland, who made with the railroad official the contract on which they were founded, shows that the understanding was as the documents indicate; that is to deliver not only to, but for, H. M. Beaty & Co. The plaintiff was not thought of or referred to by either party when the contract

Pleading and
proof—
Agency.

was made, and when the consignees were nominated and appointed by the consignors. Whether tested by the parol agreement or the bills of lading, the carrier undertook to deliver to H. M. Beaty & Co. Such is the proof, and there is no suggestion in the evidence that any contract for alternative delivery, or for any delivery in behalf of the plaintiff, was actually made. Though the declaration was not based upon alleged bills of lading, but upon contracts not described as in writing, it was not error to admit the bills of lading in evidence as competent testimony, in their character of receipts, to prove delivery to the carrier, and also as tending to prove a contract, of which delivery by the carrier to H. M. Beaty & Co. was one of the stipulations. Had Holland's testimony shown that the preliminary contract out of which the bills of lading arose, though in parol, comprehended a stipulation to deliver to the consignees for the plaintiff, or for the plaintiff's use, the declaration might, in that element of the case, have been supported. But the bills of lading, together with Holland's evidence, demonstrate that what the declaration avers as to the terms of the contract entered into for delivery is not true. The stipulation as to both consignments was to deliver to H. M. Beaty & Co.—no more and no less. The plaintiff, neither as consignee nor as usee, was within its terms.

2. It is certainly a clear rule of law that where a simple contract, oral or written, is made with an agent in his own name, and the principal is undisclosed, the latter may claim its fruits, and sue upon it, even though the agent also might sue. *Dacey, Parties*, 138 *et seq.*; *Code*, §§ 2197, 2204. And this rule applies to contracts of bailment and for transportation. *Navigation Co. v. Bank*, 6 How. (U. S.), 344; *Wood's Browne, Carr.* § 604; *Ang. Carr.* § 494. But under our system of pleading, which requires the plaintiff to fully and distinctly set forth his cause of action, (*Code*, § 3332,) the agency should be alleged as well as proved, and the contract should be set out as made with the principal through the agent; and if the terms be to pay the agent, or deliver to him, they should be recited as they were in fact. See an instance in *Woodruff v. McGehee*, 30 Ga. 158. There is no trace in this declaration that there was any agency involved in the matter. The agency is ignored, both in the declaration and in the evidence. The president and two of the stockholders in the plaintiff's corporation were examined as witnesses, and not one of them makes any allusion whatever to H. M. Beaty & Co. by name, or to any agency which they exercised in behalf of the corporation. It is said that, as there is evidence tending to show that this property belonged to the corporation, the agency

Pleading—
Enforcement
of contract by
principal.

was circumstantially proved; but, while circumstances are sufficient to establish almost anything, their force is very much weakened when the proof of them comes from a source which must be informed of the direct fact, and which fails to disclose how the direct fact was. Witnesses were examined who know whether there was an agency or not, and who could testify whether there was or not, and yet they say nothing about the agency; and the effort now is to establish it by inference from circumstances to which they have testified. The force of these circumstances is very materially weakened by coming from witnesses who must have known the direct fact as to the agency. The mind keeps constantly repeating the inquiry, if there was an agency, why did the witnesses not say so? Why was it left to be groped after, and collected from circumstances? We think no agency was proved, and certainly none was alleged. If the terms of the contract were to deliver to H. M. Beaty & Co., no matter whether H. M. Beaty & Co. were agents or not, the contract as proved was to deliver to them, and there should have been no alternative averment that it was to deliver to them or to the plaintiff. When the contract is without an alternative, it should not be alleged with an alternative; because the declaration is to give notice of the kind of contract that the plaintiff expects to rely upon.

3. As to the facts depended upon to show that there was an agency, we think this may be said: The proof is positive, by Holland, the man who made the contract with the railroad company, that the grates were consigned to H. M. Beaty & Co.; that they were ordered and bought by H. M. Beaty & Co.; and Holland was the plaintiff's witness. No witness testifies that H. M. Beaty & Co. acted as agents. The proof relied upon to show that they were ordered and bought, not by H. M. Beaty & Co., but by this corporation, is the testimony of H. M. Beaty, and of two others, who say that they were stockholders in the plaintiff's corporation. Holland testified that his firm, Withers & Holland, consignors, sold the grates to H. M. Beaty & Co.; that they had no contract with the Texas Grate Company to furnish grates; and that he knew of no connection of that company with H. M. Beaty & Co. H. M. Beaty, president of the Texas Grate Company, testified: "We bought fifty grates from Withers & Holland, and the order was in writing. They drew a draft on us, and we paid it on presentation, at Dallas, Tex. It is not true that we did not buy the grates. We did buy them. It is not true that the plaintiffs have no interest in this suit; the plaintiffs have an interest in it. It arises from the fact that we bought the state right from the patentees,

Proof of
agency.

and also fifty grates from Withers & Holland; and the defendant failed to deliver said grates as per their contract. It is not true that we did not give an order for them; we gave an order for them." Mister, a member of the plaintiff's company, testified: "We bought fifty grates from Withers & Holland. It is not true that we did not buy the grates. It is not true that we did not give an order for them." Cummins, another member of the company testified: "We bought fifty grates from Withers & Holland. Do not know about the order. It is not true that we did not buy the grates. It is not true that we did not give an order for them." A means of reconciling all this testimony, including Holland's, is to consider the word "we" as referring to H. M. Beaty & Co., and not to the corporation. It is true, it will bear either construction, and, apart from the evidence of Holland, would perhaps necessarily have to be referred to the corporation. But Holland's evidence is brought in by the plaintiff, is presented to us as true evidence by the plaintiff; and if true, the word "we," used in connection with giving an order and the purchase of the grates, must mean H. M. Beaty & Co., and that construction of it, we think, is the one to be adopted.

4. According to the evidence of two of the witnesses for the plaintiff, all the grates were ultimately delivered. One witness testified that one of the grates was short, and was never delivered. The weight of evidence is that they were all delivered. Both shipments were made in March. The first shipment arrived in May, and the second in October. The evidence as to value is, by Beaty and Cummins, that the grates were worth, in March, 1884, at Plano, Tex., \$20 each; by Mister, that they sold each at Plano, Tex., in March, 1884, for \$25; by Holland, that they were worth about the same price at Plano, Dallas, and other points in Texas. This evidence proves value in March, but makes no sort of disclosure as to the value in May or October. Nor is there any evidence going to show whether the grates, according to the regular course of business, would or ought to have arrived during March. The evidence fails to show how long was usually required to transport from Atlanta to Dallas, Tex., or what time would be reasonably necessary. As to what became of the grates, the evidence indicates that they were all received and distributed to the agents of this company; and there is no evidence that when they were received they were worth less than they were when they ought to have arrived, or that they could not have been sold on the market for that amount or some other, or as to what the state of the market then was with reference to such property.

Pleading—
Liability for
injuries to
goods.

5. The declaration alleges that some of the grates were delivered at the destination in a broken and damaged condition. Beaty testifies that the grates were in a broken and damaged condition on delivery at Dallas; Mister, that they were in a broken and damaged condition when they arrived at destination; Cummins, that the grates were badly broken up. Such is the evidence as to their condition. The declaration alleges that some of them were broken; the evidence states in general terms that they were broken and badly broken up; but the declaration does not pretend that they were all broken; and the witnesses do not discover to us how many of them were broken, or how much the breakage diminished their value.

Extent of injury to goods
—Evidence.

6. The point is made that this contract was not a through contract, but that the liability of the receiving company (the plaintiff in error here) was limited to, or at least not extended beyond, its own line. On that question, as the case has to be tried again, we rule: A railroad company whose line extends from Atlanta to West Point, Ga., having received at Atlanta goods for shipment, consigned to Dallas, Tex., and having fixed by contract with the consignor the rate of freight for the whole distance, apportioning a part of the same among three carriers, itself included, to New Orleans, and assessing the balance for the transportation beyond New Orleans, the contract was *prima facie*, a "through contract," and bound the initial company for performance to Dallas, the point of destination. This was so, notwithstanding the named rate was made subject to change without notice, the effect being to limit the agreed special rate to the particular shipments with reference to which the rate was established, but not to allow any change, either along or at the terminus of the route, which would affect these shipments. *Falvey v. Georgia R. Co.*, 76 Ga. 597, and cases cited. The evidence, however, did not warrant the verdict. The case made by the declaration was not proved, and the court erred in not granting a new trial. Judgment reversed.

Through contract.

CROSSAN

v.

NEW YORK & NEW ENGLAND R. CO.

(149 Mass. 196.)

Connecting Carriers—Prepayment of Freight—Lien for Deficiency.—Where goods are delivered to a carrier under a contract which does not purport to bind the contracting carrier as a carrier for the whole distance, but contemplates delivery to other carriers not specified, a connecting carrier to which the goods are delivered for transportation to their destination has a lien for unpaid freight, although the consignor paid to the contracting carrier a sum intended to be in full payment thereof, but which in point of fact was less than the usual rate.

ON report from Superior Court, Suffolk County.

S. J. Thomas and *C. P. Sampson* for plaintiff.

W. C. Loring and *R. M. Saltonstall* for defendant.

HOLMES, J.—This is an action of trover for the conversion of 19 horses. The horses were shipped by the plaintiff on the Pennsylvania Railroad, at Philadelphia, for Boston; were delivered by that company to another, at Jersey City; and were carried the last part of the way over the defendant's line. The plaintiff prepaid the freight demanded, which was \$44. But the Pennsylvania Railroad, in making up the total, allowed only \$32 for carriage east of Jersey City, instead of \$50, as it should have done by the defendant's tariff; so that there were \$18 still to be paid, if the defendant was to receive its usual rate. At the time the defendant accepted the goods for carriage it had notice of the contents of the waybill, from which perhaps a jury might have inferred that a railroad agent, versed in its abbreviations, would have understood that there had been an attempt to prepay the freight. It had not seen the written contract between the plaintiff and the Pennsylvania Railroad. This contract was shown to the defendant before the refusal of the latter to deliver. It contained the words, "Freight, 44.00, prepaid;" and also a promise by the plaintiff to pay the Pennsylvania Railroad at the rate of 22 cents per hundred pounds, which would make the

total \$44. On the other hand, it showed that the horses were to be carried to Boston, and did not purport to bind the Pennsylvania Railroad as a carrier for the whole distance, but contemplated delivery to other carriers, not specified. We are to take it also that the Pennsylvania Railroad was not the agent of the defendant, as the plaintiff's counsel disclaimed that ground. When the horses arrived at Boston the defendant refused to deliver them, except upon payment of the amount unpaid, which is the alleged conversion.

The question is whether the defendant had a lien for the freight due to it, according to its schedule, and unpaid. The answer is not to be found in the letter of the document, but in general principles of law and considerations of policy. The plaintiff contends that the Pennsylvania Railroad was a special agent, having no ostensible authority greater than that which he actually intended to give it; or, at least, that, if the defendant had notice that he had prepaid the freight demanded, it had notice that the Pennsylvania Railroad had no authority to give it a lien for any further sum which the defendant might be entitled to demand. This view is not without sanction. *Marsh v. Union Pac. R. Co.*, 3 McCrary (U. S.), 236, 6 Am. & Eng. R. Cas. 359. But we think that there are weightier considerations in favor of the defendant. Suppose that it had had the facts definitely before it. It would have seen, to be sure, that the plaintiff did not contemplate paying any more money, but it would have seen also that he did contemplate and desire that the horses should be carried through to Boston by a continuous and speedy passage. The existence of the latter expectation is confirmed by the plaintiff's declaration and by his testimony. He was not entitled to have both his expectations made good by the defendant. An unforeseen case had arisen, and the defendant was called on by the plaintiff's forwarding agent to act at once in some way. *Potts v. New York & N. E. R. Co.*, 131 Mass. 455. The forwarding agent, whatever its obligations to the plaintiff, only consented to be liable personally to the defendant for \$32, but required the defendant to forward the goods. The defendant was not bound to carry for less than its full charge, if it had any right to do so. But if the demand to forward was authorized ostensibly or by implication—that is to say, if the carriage would give it a lien—it was liable to the plaintiff if it refused, except that it might demand prepayment. The plaintiff was not present, and it might take time and cost money to communicate with him. The horses were perishable, and their keep would probably have cost more than the unpaid freight, if they had been delayed, although we do not now decide whether these last facts make

Lien for unpaid freight—
Authorities.

a difference in the law. If the plaintiff had a contract with the Pennsylvania Railroad, that company could be made to indemnify the plaintiff in the place where the contract was made. Under such circumstances, there can be no doubt what course was most for the advantage of the owner, or what directions a prudent owner, if present, would give, and the analogies of the law would imply a corresponding authority in the defendant. *Knight v. Providence & W. R. Co.*, 13 R. I. 572, 576, 9 Am. & Eng. R. Cas. 90; *Pierce v. Columbian Insurance Co.*, 14 Allen (Mass.), 320, 323. If the effect of the plaintiff's instructions were doubtful, the law would give the defendant the benefit of the interpretation adopted by it in good faith. (*Ireland v. Livingston*, L. R. 5 H. L. 395, 416,) and would consider the necessity of an immediate decision, (*Hawks v. Locke*, 139 Mass. 205, 209.) But the defendant does not need the aid of such considerations. Taking into account what we have said, and also that the defendant had a right to assume that the plaintiff knew that it was not bound by the Pennsylvania Railroad's contract, and therefore knew that a higher rate might be demanded beyond the lines of that road than had been paid, we are of opinion that the defendant was justified in giving preponderance to the requirement of continuous and speedy carriage, and in assuming that the authority of the Pennsylvania Railroad to offer the horses was not conditional upon the prepayment of freight by the plaintiff turning out to be full payment of all that the defendant could demand. See *Wolf v. Hough*, 22 Kan. 659; *Wells v. Thomas*, 27 Mo. 17; *Vaughan v. Providence & W. R. Co.*, 13 R. I. 578, 581, 9 Am. & Eng. R. Cas. 41; *Schneider v. Evans*, 25 Wis. 241, 250, 261, *et seq.*

It is to be observed that the principle that no man's property can be taken from him without his consent, express or implied, has not prevented the last of a line of carriers from maintaining its lien, when the first carrier has forwarded the goods to a wrong place. *Briggs v. Boston & L. R. Co.*, 6 Allen (Mass.), 246, (distinguishing *Robinson v. Baker*, 5 Cush. (Mass.), 137); *Whitney v. Beckford*, 105 Mass. 267; *Patten v. Union Pac. R. Co.*, 29 Fed. Rep. 590, (disapproving *Fitch v. Newberry*, 1 Doug. (Mich.), 1); *Vaughan v. Providence & W. R. Co.*, 13 R. I. 578, 9 Am. & Eng. R. Cas. 41. Yet in that case the last carrier might be said to have notice that the forwarding agent's authority was limited to sending the goods to the place directed by the shipper.

A subordinate argument was suggested, that the plaintiff was entitled to go to the jury on the allegations of unreasonable delay in transportation, and of detention of the horses upon the defendant's cars. But there was no evidence of un-

reasonable delay by the defendant after the horses were received, and the consequences of the detention after arrival are only alleged as matter of aggravation of the alleged wrongful refusal to deliver them. As the refusal was rightful, negligence in the care of the horses while detained, if any there was, cannot be relied on as a substantive cause of action. It is plain, too, that the case was not tried on the footing of an action for negligence in rightful keeping, and the plaintiff acquiesced in that view of the case, and did not seek to amend. The questions of evidence are not argued by the plaintiff, and are sufficiently answered by the foregoing discussion. Judgment on the verdict.

Connecting Carriers—Prepayment of Freight.—Where goods are delivered to a common carrier to be carried to a designated place, and the charges for transportation to that place are paid in full, and the goods are received by the carrier without any contract limiting its liability, such carrier is responsible for the delivery of the goods at the place designated, although its line ends before reaching such place and the goods are delivered to another carrier in good order at the termination of its line. *Adams Express Co. v. Wilson*, 81 Ill. 339.

But if a connecting carrier received goods from another carrier, and the latter neglects to inform the former that the freight has been paid, the connecting carrier is not responsible for such omission, and may retain the goods in its possession for such time as is necessary to enable it to inquire into and ascertain the facts. *Union Express Co. v. Shoop*, 85 Pa. St. 325.

A shipper shipped goods to Girard, Kansas. The agent of the road who received the goods, took from the shipper a sum which he said would be sufficient to pay the freight charges through, and gave him a receipt upon which was endorsed "Freight charges paid free to Girard." A connecting carrier received the goods without any knowledge or notice of the action of the agent, or of the receipt by him, and carried them over its road to their destination. Only a portion of the charges were in point of fact paid. The receiving agent had no authority to act for the connecting carrier, nor did he pretend to have any. No contract or agreement of any kind was shown to exist between the two roads in reference to the shipments of freight or contracts therefor. *Held*, that the connecting carrier had a lien upon the goods for its unpaid charges. *Wolf v. Hough*, 22 Kan. 659. See also *Wells v. Thomas*, 27 Mo. 17.

Plaintiff made a contract with the Pittsburg, Cincinnati & St. Louis R. Co. to convey a car load of household goods from Zanesville to Denver for the sum of \$185, then paid to said company. The car was brought to St. Louis by that company, and from St. Louis to Kansas City by the Wabash, St. Louis & Pacific R. Co., and from Kansas City to Denver by defendant. At Denver, defendant demanded an additional sum of \$15, claiming that its charge for conveying a car-load of said goods from Kansas City to Denver was \$100, and as it had received only \$85 from the Wabash Co., a sum of \$15 was still due from plaintiff. The defendant had a rule that for carrying household goods, payment must be made in advance. The jury found that defendant received the goods from the Wabash Co. with knowledge of the fact that a through contract for carrying them had been made and that plaintiff had paid for the service. *Held*, that the defendant had no lien for the alleged charge of \$15. *Marsh v. Union Pacific R. Co.* (C. C.), 6 Am. & Eng. R. Cas. 359.

Where a carrier makes a special agreement for the transportation to a point beyond the terminus of his route, the ultimate carrier can only recover from the consignee the amount so agreed on, and the latter can recoup any damage to the property received on any portion of the route. *Mallory v. Burrett*, 1 E. D. Smith (N. Y.), 234.

Where the first carrier guarantees a rate through to the destination, succeeding carriers are not bound by such guarantee even if they have notice of it. *Vaughan v. Providence & W. R. Co.*, (R. I.) 6 Am. & Eng. R. Cas. 41.

If there is an agreement between connecting railroads by which freight may be received by one to be delivered at a point on the other for a sum less than the aggregate regular charge of both, the latter, upon receiving such freight, must deliver it at such point to the consignee upon his tendering such sum to the proper agent of the latter; but if no such agreement exists and freight is received by one of the companies to be delivered at a point on the other for a sum less than the aggregate regular charges to both, the latter company on receiving it and carrying it to such point, must deliver it to the consignee upon his tendering such sum, provided it equal the regular charges of the latter, whether it does or does not include any charges for the former. *Evansville & C. R. Co. v. Marsh*, 57 Ind 505.

A receiving carrier guaranteed that the whole freight upon goods shipped to a point beyond its own line should not exceed a certain sum. The connecting carrier paid the charges of the receiving carrier in full, and at the point of destination claimed a lien for the whole freight although it exceeded the guaranteed amount. It was admitted that the connecting carrier had no knowledge of the guarantee given by the receiving carrier. *Held*, that although the shipper might recover the excess from the receiving carrier, the connecting carrier had a valid lien for the whole freight. *Schneider v. Evans*, 25 Wis. 241, 265; 9 Am. L. Reg. (N. S.) 236.

PHILADELPHIA & READING R. CO.

v.

BECK.

(*Pennsylvania Supreme Court, April 22, 1889.*)

Carriage of Goods—Instructions as to Route—Liability for Loss.—Where a carrier to whom goods are delivered, is directed to forward them from the *terminus* of its line by a certain route by fast freight and he, in disregard of instructions, forwards the goods by steamer instead, and a loss ensues, an action for damages is founded not upon the negligence of the carrier, but upon the breach of contract in failing to forward the goods according to instructions, and the defendant's liability is not dependent upon the doctrine of proximate cause.

ERROR to the Court of Common Pleas, Philadelphia County. Action by T. S. Beck against the Philadelphia & Reading R. Co., to recover the value of certain goods delivered to defendant for transportation. The defendant brings error to review a judgment for the plaintiff.

The fourth point submitted by the defendant to the court and the answer thereto were in the following terms: *Point*. "Even if the jury should believe that at the time of the shipment of the goods the original invoice delivered therewith did contain the words 'Via Atlantic Coast Line, by fast freight,' the evidence shows that the proximate cause of the loss of the goods was a fire which took place on the steamer Dessoug, while the goods were in transit by the Ocean Steam-Ship Company between Philadelphia and Savannah. The failure of the defendant to forward the goods by the Atlantic Coast Line was not the proximate cause of the loss, and the plaintiff cannot, therefore recover from this defendant."

Answer. "I decline to affirm that proposition as applicable to this case. I do not think this is a question to be determined by the principle which is sought to be invoked in the point which has been raised; that is, the fourth point. This is a question of a contract between the plaintiff and the defendant, and if the defendants broke their contract, and loss resulted from the failure, it was not a case of negligence, whether the injury resulted from a proximate or any remote cause connected with the loss of these goods. The question is as to whether there was such a contract as I have referred to, where the defendants undertook to dispatch them in a particular way; whether they kept that contract or whether they broke it; and if the jury believe that the defendants broke their contract, and that the loss resulted to the plaintiff, the plaintiff would be entitled to recover his loss as against the defendants.."

Thomas Hart, Jr. for plaintiff in error.

William C. Gross and Thomas F. Gross for defendant in error.

PER CURIAM.—We do not think the question of proximate cause has anything to do with this case. It was not a suit to recover damages for the negligence of the defendant company, but for its breach of contract in not forwarding the cigars according to instructions.

Liability of
carrier arises
out of breach
of contract.

The plaintiff lived at Akron, in the county of Lancaster, Pa., and he shipped over defendant's road five cases of cigars to Benhayon & Gonzales, St. Augustine, Fla. Each case was marked "Via Philadelphia, care of Atlantic Coast Line, by fast freight." When the cases reached Philadelphia, the de-

fendant company, instead of shipping them as directed by rail, delivered the said five cases to the Ocean Steam-Ship Company, of Savannah, and sent them by sea. They were destroyed by fire *en route*. The statement filed by the plaintiff gives some color to the allegation that the suit was for negligence. It avers that "in consequence of the carelessness, negligence, and improper conduct of the defendant in that behalf, the goods have never been delivered to the said consignees," etc. It is sometimes difficult, in the present free and easy mode of pleading, to ascertain accurately what is the precise cause of action. We are inclined to the opinion, however, that it was for breach of the contract to forward the cigars as directed.

If the defendant company, for reason of its own, saw fit to disregard instructions, and forward the cigars by steamer instead of by rail, and a loss resulted, it is too plain for argument the defendant would be responsible for such loss. It is begging the question to say that if the cigars had been shipped by rail, as directed, a loss might have occurred. In such case the defendant would have incurred no responsibility. This question is distinctly raised by the answer of the court below to the defendant's fourth point. See third assignment. As this was the only assignment pressed upon the argument it is sufficient to say that we are entirely satisfied with the answer of the learned judge below to the point. Judgment affirmed.

Connecting Carriers—Duty and Liability as Forwarding Agents in Transmitting Shipper's Instructions.—A common carrier who undertakes to transfer goods over the whole or any part of his own route, and then to forward them to a designated destination beyond, is bound to transmit with their delivery to the next carrier *en route*, all special instructions received by him from the consignor and in default thereof in any material or substantive particular, must stand responsible for and make good the loss to which such negligence shall have contributed. *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324; *Dana v. New York Cent. & H. R. R. Co.*, 50 How. Pr. (N. Y.) 428. But a carrier who acts as forwarding agent in giving directions to the successive lines of transportation over which the goods are to be carried, is responsible only for the want of reasonable diligence and care. *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen (Mass.), 254. Marks and labels on the packages delivered will not be sufficient to supply the omission of instructions from the accompanying shipping bills where such marks or labels are not shown to have come to the actual knowledge of the next succeeding carrier or his agent. *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324.

A waybill of iron rails to be transferred over several successive lines of transportation by railroad made out by the agents of the first line in this form: "Way bill of merchandise transported by the F. R. R. from C. to B., Nov. 27, 1852. (Consignees.) Ogdensburg R. R. (Description of Articles.) Rails, part lot," is sufficient to show to the intermediate carriers that the rails are to be carried and delivered to the Ogdensburg R. R., and

to exonerate the first carrier from liability, although the rails are detained and used by one of the intermediate railroad companies, which at the same time is receiving other similar rails over the same route for its use. *North-ern R. Co. v. Fitchburg R. Co.*, 6 Allen (Mass.), 254.

Forwarding agents must obey the instructions of the consignor either express or fairly implied, and if they vary from these instructions and loss is caused thereby, they are liable to the owner of the goods. *Forsythe v. Walker*, 9 Pa. St. 148; *Patten v. Union Pacific R. Co.*, 29 Fed. Rep. 590. A carrier who has contracted to forward goods by a particular steamer, is liable for their loss if he forwards them by another without authority, even though the designated steamer has been withdrawn. *Goodrich v. Thompson*, 44 N. Y. 324; aff'd 4 Robt. (N. Y.) 75. If the designated carrier refuses to receive the goods for transportation, the forwarding carrier is not empowered to forward the goods to their destination by another route without the express authority of the consignor. In the event of such a refusal, the forwarding carrier should either notify the consignor thereof, or deposit the goods for safe keeping in a suitable warehouse. *Johnson v. New York Cent. R. Co.*, 33 N. Y. 610; rev'd 31 Barb. (N. Y.) 196.

The plaintiffs ordered goods from K., L. & Co., to be shipped to plaintiffs at Flat Creek, Manitoba, via. the C. M. & St. P. R. Co., by which line plaintiffs had an arrangement for a special rate of freight, of which they informed K., L. & Co., but did not notify them of the terms thereof. K., L. & Co. delivered the goods to C. & M. at Montreal as agents of the defendant's line of boats consigned to the plaintiffs, to be sent by the said line of boats to M., and thence to C. M. & St. P. R., and informed C. & M. of the fact of plaintiffs' having a special rate. The bill of lading which C. & M. gave for the goods was prepared by a clerk of K., L. & Co., who stated that he attached thereto a ticket marked "Ship our freight by C., M. & St. P. R.; great bonded fast line; low rates." The goods were carried by defendant's vessel, not to M., but to D., and thence by railway to their destination, and were accepted by plaintiffs, but plaintiffs had to pay higher freight than if carried as directed. The goods were carried from D. as quickly, or more quickly, than they would have been from M., and the freight would have been less had it not been for plaintiffs' special agreement with the C. M., etc., R. Co. The defendant's conduct in sending the goods by D. was proved to have been willful. *Held*, that there was a valid tract to carry via M., and that plaintiffs were entitled to recover for the breach thereof in not carrying therefrom; but that plaintiffs could only recover nominal damages. *Langdon v. Robertson*, (Ont.) 30 Am. & Eng. R. Cas. 23.

If a forwarding merchant erroneously inserts the name of a consignor in the bill of lading which was not marked on the goods, and in consequence thereof, the goods are seized and sold by the sheriff as the property of the person whose name is thus inserted, the forwarding merchant is liable to the real owner. *Forsythe v. Walker*, 9 Pa. St. 148.

The receipt of insurance upon goods is not a ratification of the act of the carrier in forwarding them by a connecting carrier other than that specified in the contract. *Goodrich v. Thompson*, 44 N. Y. 324; aff'd 4 Robt. (N. Y.) 75. Nor is the acceptance of a portion of the goods which have been diverted, a waiver of claim for loss resulting from delay in transportation. *Georgia R. Co. v. Cole*, 68 Ga. 623.

In New York, it has been held, that the receiving carrier who misdelivers goods contrary to agreement, to another carrier, remains liable as insurer for any injury or loss occurring on the route to which the goods have been diverted. *Isaacson v. New York Cent. & H. R. Co.*, (N. Y.) 16 Am. & Eng. R. Cas. 188; *Johnson v. New York Cent. R. Co.*, 33 N. Y. 610, rev'd 31 Barb. (N. Y.) 196. In Georgia, the court has held that a diversion

to a route other than that specified in the contract is a conversion of the goods, which renders the carrier misdelivering the goods to his connecting carrier liable in damages. *Georgia R. Co. v. Cole*, 68 Ga. 623.

If a common carrier contracts to transport goods to a point beyond its own line, and that these goods shall go through the entire route on the identical cars upon which they are shipped, and by reason of their being changed into other cars in the course of transportation they are lost or damaged, the carrier is liable, no matter whether the loss or damage occurred on its own line or that of a connecting carrier, and this, although the contract contained a special provision that the carrier was not "to be liable for any damages, loss or injury not on its own railroad." *Galveston, H. & H. R. R. Co. v. Allison*, (Tex.) 12 Am. & Eng. R. Cas. 28. See also *Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa 470.

A consignor of goods, after they have passed from the hands of the railroad company into the hands of another company, has the same right to change their destination while *in transitu* by taking a new bill of lading, as if the first company had a continuous line to the place of destination. *Sutherland v. Second Nat. Bank*, (Ky.) 6 Am. & Eng. R. Cas. 368.

Plaintiff delivered at a station of the South Staffordshire R. Co. certain goods addressed to the "East India Docks, London," and paid one sum for their carriage for the whole distance. By the contract of the South Staffordshire R., all goods delivered at that station for London were forwarded by its own line to Birmingham, and thence by the London & N. W. R'y. Before the goods in question arrived in London, the plaintiff directed a clerk at the London station of the latter company to forward them to another place, which the clerk promised to do. The goods were however delivered according to the original address and thereby lost. *Held*, that the South Staffordshire R. Co. was responsible for the loss. *Scothorn v. South Staffordshire R. Co.*, 8 Exch. 341.

Plaintiffs, in accordance with their usual custom, sent to the defendant railroad company by which they made a shipment, a "dray ticket" filled out by plaintiffs, to be signed as a receipt for the goods by the proper officer of the freight department of the railroad company, containing a description of the goods together with the name of the consignee and their destination. The ticket also provided that the goods should be forwarded "subject to the conditions of company's regular bill of lading." The bill of lading was in a form which gave the company the option of forwarding goods by any route from its terminus to the destination beyond its line. The usual route between the terminus of the receiving railroad and the designated destination was by water, which was the route by which the goods were sent. The goods were never delivered to the consignee. In an action to recover their value, held that the sending of the "dray ticket" constituted a contract between the shippers and the receiving railroad company for the transmission of the goods in the ordinary way, *i. e.*, by rail and water and not all by rail; that the sending of such "dray ticket" which contained no designation of an all-rail route, would be a revocation of a distinct agreement for an all-rail route claimed by the shippers to have been made by telephone, admitting such agreement to have been made. *Hostetter v. Baltimore & O. R. Co.*, (Pa.) 32 Am. & Eng. R. Cas. 549.

DENVER & RIO GRANDE R. Co.

v.

HILL.

(Colorado Supreme Court, May 24, 1889.)

Carriage of Goods—Lien of Connecting Carrier—Shipper's Instructions.—If goods are delivered to a carrier to be forwarded by a specified connecting line and the receiving carrier fraudulently diverts them to a rival line which receives them in the knowledge of the fact that specific directions to ship by another line had been given, the connecting carrier actually receiving the goods has no lien for freight earned or advanced.

APPEAL from El Paso County Court.

The appellee, as plaintiff, filed his complaint against the defendant in the court below, alleging ownership and right of possession to certain grain, which he claimed was unlawfully taken and wrongfully withheld from him by the defendant after demand. The value of the property was stated to be \$400. The defendant denied all the allegations of the complaint, and claimed a carrier's lien upon the property for transportation from Denver to Colorado Springs, and also for freight charges advanced to the Union Pacific Railway Company. In his replication the plaintiff denied the defendant's claim for a lien upon the property, and alleged that the owner had directed the goods to be shipped from the city of Denver to their destination over the Denver & New Orleans Railroad, a competing line with that operated by the defendant, and averred that the defendant, well knowing such shipping directions, obtained possession of the goods as the result of a conspiracy between it and the Union Pacific Company to divert all traffic from such competing line. Upon a trial to the court below without the intervention of a jury, the issues were found for the plaintiff, and a judgment rendered in his favor. To reverse this judgment the defendant brings the case here by appeal.

E. O. Wolcott for appellant.

Wells, McNeal & Taylor for appellee.

HAYT, J.—From the evidence introduced at the trial, it is
40 A. & E. R. Cas.—10

shown that in the year 1883 a car-load of grain was shipped from St. Edwards, Neb., to the appellee, at Colorado Springs.

Case stated. The city of Denver being the nearest point to Colorado Springs upon the line of the Union Pacific road, the consignor directed the goods to be forwarded from Denver to their destination by the Denver & New Orleans road, which directions were plainly marked upon the receipt given for the goods by the agent of the Union Pacific Company at St. Edwards, and also upon the way-bill filled out at the same time. The agent of the Denver & New Orleans road at Denver, having been informed of the shipment, notified the agent of the Union Pacific road at Denver, shortly before the arrival of these goods, that the former company would insist upon having these goods turned over to it at Denver for transportation over its road to appellee at Colorado Springs, and was informed by the former agent that, in obedience to instructions from his superiors, he must decline to deliver the goods to the Denver & New Orleans road. The agent of the latter road renewed the claim for the goods from day to day, and upon the day of the arrival of the goods in Denver, and while the same were in the yards of the Union Pacific road at Denver, made inquiry in reference to the matter, and was informed that the goods had not yet arrived, and could not arrive before the following day. The day after, however, he was informed that the goods had arrived the day before, and were then at Colorado Springs, having been shipped over the Denver & Rio Grande Railroad, a competing line to the one operated by the Denver & New Orleans Company. It was also shown that it was the common practice at this time for the Union Pacific Company to deliver, and the Denver & Rio Grande road to receive and transport, freight consigned over the Denver & New Orleans road, and that this was done in pursuance of an agreement between the former companies. Mr. Thomas Whittall, the local freight agent of the Union Pacific Railway Company, testified at the trial that Mr. Taylor, agent of the Denver & New Orleans, at various times presented to him bills of lading for freight in possession of the Union Pacific Company, but routed over the Denver & New Orleans road, and that he believes in every instance such freight was sent by the Denver & Rio Grande road, and that in such cases it was customary to furnish the latter company with bills of lading showing the correct routing directions of the goods. The testimony also shows that this was not only done with the knowledge and consent of the general manager and the general freight agent of the Denver & Rio Grande Company, but that these officers were active and vigilant in requiring goods so routed to be di-

verted to the Denver & Rio Grande road; and that the few instances in which, in obedience to the directions of the consignors, the goods were delivered to the Denver & New Orleans road, called for a vigorous protest from them, coupled with an implied threat of retaliation against the Union Pacific Company. No attempt was made by appellant to disprove the evidence introduced by the appellee in the court below. It is, however, contended upon this appeal that the judgment is contrary to law.

It has been held that a carrier receiving goods to be transported beyond its line, in delivering them to a subsequent carrier, acted as a special agent of the consignor, with limited powers; and that if it disregarded its instructions, and exceeded its authority, the subsequent carrier could not maintain a lien upon the goods for its transportation charges. *Fitch v. Newberry*, 1 Doug. (Mich.), 1. In later decisions in other states the doctrine of the Michigan court, however, has not been followed; the courts now generally holding that a carrier receiving goods to be transported over its own line to a point beyond has the apparent authority to select any of the ordinary routes leading thereto, and that the second carrier receiving the goods in good faith, in the ordinary and usual course of business between connecting lines, without notice of any special directions on the part of the consignor, will have a lien for his reasonable charges for transporting such goods over its own line, and also for such reasonable charges as it may have advanced to the first carrier. *Price v. Denver and Rio G. R. Co.*, 12 Colo. 402, 37 Am. & Eng. R. Cas. 626. An examination of the opinion of Commissioner Stallcup in the case just cited will show that, while the right of the consignors to select the routes over which the goods should be transported is fully recognized, it is held that, in case his instructions in reference thereto are not obeyed by the first carrier, the owner's action was not against the innocent second carrier, but against his own wrong-doing agent. In support of this position the following cases were relied upon: *Patten v. Union Pac. R. Co.* 29 Fed. Rep. 590; *Schneider v. Evans*, 9 Amer. Law Reg. (N. S.) 536; *Briggs v. Boston & L. R. Co.*, 6 Allen (Mass.), 246. In the first two cases cited the ignorance of the second carrier of the terms of the contract is made an express condition of its exemption from liability in case of loss to the owner. And a reading of the opinion in the case of *Briggs v. Boston & L. R. Co.*, *supra*, will also show that in that case no wrong or negligence was attributable to the defendant company. In the case at bar, however, we have seen that the Union Pacific and the Denver & Rio Grande Companies

Lien of connecting carrier.

had entered into an agreement to disregard all directions requiring goods to go over other lines, and that, in pursuance thereof, all routing directions to the contrary were being ignored by both companies; that the general officers of the appellant company were zealously enforcing a compliance on the part of the Union Pacific Company with such agreement; that it was customary for the latter company to deliver goods routed over the Denver & New Orleans road to the Denver & Rio Grande road for transportation; and that goods were so received and forwarded by the latter company, with full knowledge that the same was in violation of the owner's directions, and that the officers of the road entered a vigorous protest whenever the Union Pacific company delivered goods to the Denver & New Orleans road for transportation, although such delivery was in accordance with the express directions of the owner of the property. The evidence shows that the shipping directions in reference to the goods in controversy were willfully violated by the Union Pacific Company, and we think, under the evidence, the court below was justified in holding the Denver & Rio Grande Company also responsible for such violation.

This company having been a party to an illegal contract providing, not only for a violation of the owner's routing directions, but calculated also to prevent notice of such directions from reaching the second carrier, cannot be shielded in this instance, because no witness was able to swear in direct terms that it had notice of the owner's directions in reference to the shipment of these particular goods. Under these circumstances we are of the opinion that the court below was warranted in finding that the possession of the property was not obtained in good faith by the defendant in the ordinary or usual course of business between connecting carriers, but that such possession was wrongful and illegal, and that the defendant was consequently not entitled to a carrier's lien upon the same, either for its own charges or those advanced to the former carrier, and consequently there was no error in entering judgment for plaintiff. *Redf. Carr. § 271 et seq.; Fitch v. Newberry, supra; Robinson v. Baker, 5 Cush. (Mass.), 137; Andrew v. Dieterich, 14 Wend. (N. Y.), 31; Briggs v. Boston & L. R. Co., supra.* The judgment is accordingly affirmed.

Lien of Connecting Carriers.—When an owner of goods delivers them to a carrier to be transported over his route, and thence over the route of a succeeding carrier or the routes of several successive carriers, he constitutes the persons to whom he delivers them his forwarding agents, for whose acts in the execution of that agency he is responsible. *Bird v. Georgia R. Co. (Ga.), 27 Am. & Eng. R. Cas. 39; Potts v. New York & N. E. R. Co. (Mass.), 3 2b.*

424; *Briggs v. Boston & L. R. Co.*, 6 Allen (Mass.), 246; *Vaughan v. Providence & W. R. Co.* (R. I.), 9 Am. & Eng. R. Cas. 41. See also *Whitney v. Beckford*, 105 Mass. 267. And a common carrier who undertakes to transport goods over the whole or any part of his own route, and then to forward them to a designated destination beyond, is bound to transmit with their delivery to the carrier next on the route, all special instructions received by him from the consignor, and in default thereof, in any material or substantive particular must stand responsible for, and make good the loss to which his negligence shall have contributed. Marks or labels on the package delivered, will not supply the omission of such instructions from the accompanying way bills where they are not shown to have come to the actual knowledge of the next succeeding carrier. *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324. But in the case of a mistake by a forwarding carrier in directing the goods, the last carrier is entitled to charge reasonable freight rates and has a lien therefor; *Price v. Denver & R. G. R. Co.* (Colo.), 37 Am. & Eng. R. Cas. 626; *Bird v. Georgia R. Co.* (Ga.), 27 *Id.* 39; *Briggs v. Boston & L. R. Co.*, 6 Allen (Mass.), 246; *Patten v. Union Pacific R. Co.*, 29 Fed. Rep. 590; and the carrier's lien is as good against the consignor as against the consignee, and justifies the retention of the goods even where the consignor endeavors to exercise his right of stoppage *in transitu* after a part delivery. *Potts v. New York & N. E. R. Co.* (Mass.), 3 Am. & Eng. R. Cas. 424.

When goods are not sent according to the instructions of the consignor or owner, but by some other route, there is no lien for the freight, *Marsh v. Union Pacific R. Co.* (C. C.), 6 Am. & Eng. R. Cas. 359, if the receiving carrier had notice of the shipper's instructions; *Bird v. Georgia R. Co.*, (Ga.), 27 Am. & Eng. R. Cas. 39; and the question whether the carrier receiving and transporting the goods had knowledge of the shipper's directions as to the route, is one of fact for the jury, and the marks on the goods may be considered with other circumstances in determining the question; *Bird v. Georgia R. Co.* (Ga.), 27 Am. & Eng. R. Cas. 39. But the fact that the car received by the carrier was the property of the company by which the goods were instructed to be forwarded, is not sufficient to give the connecting carrier implied notice of the instructions, even though it is appropriately marked. *Patten v. Union Pacific R. Co.*, 29 Fed. Rep. 590.

Cotton was forwarded from Louisiana to be delivered in Providence R. I., "rates guaranteed to Providence." By the error of some intermediate carrier, the destination Providence was changed to Chicopee, Mass., whence by the owner's direction the defendant, after paying charges, brought it to Providence. The owner refused to refund the defendant its charges for freight paid and replevied the cotton. *Held*, that the defendant had a lien for its freight and charges. *Vaughan v. Providence & W. R. Co.* (R. I.), 9 Am. & Eng. R. Cas. 41.

Plaintiff contracted with the Red Line Company consisting of several railroad companies including the defendant company, to transport a quantity of corn from Delevan, Ohio, to East Boston, Mass. The corn was intended for Springvale, Me, but by mistake of the shipper, or of the clerk of the railroad company at Toledo, Ohio, was billed to Springvale, N. H. By mistake of the agents of the Red Line Company at Toledo, the word "Springfield" was substituted for Springvale in the bill. Upon its arrival at East Boston, one car load of the corn was sent to West Andover, N. H. the nearest railroad station to Springfield, N. H., there being none in that town. The corn was sent back to East Boston where the plaintiff demanded its delivery to him upon tender of payment of all the charges from Delevan to East Boston. Defendants declined to deliver unless the plaintiff paid the charges incurred by the trip from East Boston to West Andover and back. *Held*, that plaintiff was not liable for these charges. *Jones v. Boston & A. R. Co.*, 63 Me. 188.

A common carrier receiving goods from a wrongdoer, has no lien thereon against the rightful owner even for freight which he has paid to a previous carrier to whom the goods had been delivered for transportation by the owner's directions, *Robinson v. Baker*, 5 Cush. (Mass.), 137; *Stevens v. Boston & W. R. Co.*, 8 Gray (Mass.), 262; *Fitch v. Newberry*, 1 Doug. (Mich.), 1; and if, in the course of the transportation of goods, the owner deposits them with a wharfinger and does not authorize him to forward them, a common carrier to whom they are delivered by the wharfinger has no lien on them for freight. *Clark v. Lowell & L. R. Co.*, 9 Gray (Mass.), 23.

Plaintiff, the owner of a parcel of flour delivered it at Black Rock on board of one of the canal boats of the old Clinton Line Co., who gave for it bills of lading in duplicate, wherein it agreed to transport it to Albany and there deliver it to Witt, the agent of the Western R. Co. Plaintiff sent one of the bills of lading to Witt and the other to the consignee at Boston. The Old Clinton Line Co. instead of delivering the flour to Witt, shipped it by boat to Boston. The owners of the vessel claimed a lien for the freight. *Held*, that the Old Clinton Line Co. in delivering the flour on board the vessel, was a wrongdoer, and that there was no lien. *Robinson v. Baker*, 5 Cush. (Mass.), 137. In *Briggs v. Boston & L. R. Co.*, 6 Allen (Mass.), 246, this case was distinguished, and it was pointed out that the service which the Old Clinton Line Co. was to render, was exclusively in its capacity as a common carrier. The only authority conferred upon it was to carry the flour to Albany and there deliver it to Witt. It had no other duty to perform and no right to exercise any control over it for any other purpose, and accordingly was not the forwarding agent of the plaintiff.

Common carriers are under no obligation to pay accrued charges on freight tendered to them by connecting carriers, even when it is customary to do so. *Baltimore & O. R. Co. v. Adams Express Co.*, 22 Fed. Rep. 32, 404. But if there is an association of carriers between two points by which the carrier at one end is authorized to contract for, and bind all the carriers on the route, when payment for the whole route has not been taken in advance, no freight is due until the goods arrive safely at the end of the voyage, but unless bound by some such agreement, every road has the right to demand payment in advance, and if payment be not so made, to retain a lien therefor. *Knight v. Providence & W. R. Co.* (R. I.), 9 Am. & Eng. R. Cas. 90. A connecting carrier is authorized to advance for, and on account of the consignee, previous charges upon the goods, but in so doing he is bound to act in good faith. *Bissel v. Price*, 16 Ill. 408. If the payment is made in bad faith, there will be no lien for the amount advanced. *Adams v. O'Connor*, 100 Mass. 515. The connecting carrier must see that the goods are in apparent good order as described in the previous bill of lading, or if not, use reasonable exertions to ascertain how they became damaged and the party liable therefor. He must also see that the previous charges are reasonable before he is authorized to pay them. *Bissel v. Price*, 16 Ill. 408. But if the goods received from the prior carrier are apparently in good order, he is not obliged to open the packages for further examination. *Knight v. Providence & W. R. Co.* (R. I.), 9 Am. & Eng. R. Cas. 90. His authority to pay back charges may be terminated by notice from the shipper not to make any further payments on his account on the goods forming a particular consignment. *Knight v. Providence & W. R. Co.* (R. I.), 9 Am. & Eng. R. Cas. 90. The connecting carrier is entitled to a lien not only for the freight which he has earned, but also for the charges paid. *Potts v. New York & N. E. R. Co.* (Mass.), 3 Am. & Eng. R. Cas. 424; *Knight v. Providence & W. R. Co.* (R. I.), 9 *Id.* 90.

A common carrier receiving goods in the ordinary course of business and in the proper line of transit, has a lien for the freight charges, although the

goods may have suffered damage before they reached him while in the hands of some preceding carrier; *Bowman v. Hilton*, 11 Ohio, 303; *Monteith v. Kirkpatrick*, 3 Blatchf. (U. S.), 279; and the consignee cannot set off against the carrier's claim, a claim for damages caused by the negligence of the receiving carrier. *Bissel v. Price*, 16 Ill. 408. But compare *Mallory v. Burrett*, 1 E. D. Smith (N. Y.), 234.

Where the carrier has advanced the charges of an antecedent carrier who transported the goods under an independent contract, he is subrogated to the rights of the latter and may recover such charges, although he fails to perform his own contract and has no lien for charges therefor. *Western Transportation Co. v. Hoyt*, 69 N. Y. 230.

ADAMS EXPRESS CO.

v.

HARRIS *et al.*

(*Indiana Supreme Court, May 9, 1889.*)

Connecting Carriers—Privity of Contract—Stipulations Limiting Liability.—When a contract is made for the carriage of goods to a point beyond the line of the contracting carrier, and the choice of the connecting carrier is left to the carrier to whom the goods are delivered, the stipulations of the contract only inure to the benefit of the contracting carrier, and not to the benefit of any other carrier forwarding the goods.

Pleading—Averment of Incorporation of Defendant.—The name, "Adams Express Co." applied to the defendant in an action, imports that it is a corporation, and it is not therefore necessary to specifically aver that fact.

Carriage of Goods—Waiver of Tender of Freight.—The denial by a common carrier of the possession of the goods excuses the consignees from making a tender of the freight upon demanding delivery.

Same—Admissibility of Declarations of Claim Agent.—Where a corporation invests an agent with general authority to adjust claims against it, the declarations of that agent made while endeavoring to secure an adjustment of the claim, are admissible against the principal.

Same—Limitation of Liability—Consideration.—When there is evidence of negligence and no evidence that a lower rate of freight was given on account of a limitation placed upon the value of the property, such limitation forms no defense in an action against the carrier.

APPEAL from Circuit Court, Morgan County.

James H. Jordan and Oscar Matthews for appellants.

Adams & Newby for appellees.

ELLIOTT, C. J.—The material facts pleaded by the appel-

lees as their cause of action are these: On and prior to the 17th day of January, 1885, they were partners engaged in business as nursery-men. On that day a lot of fruit trees was delivered to the United States Express Company at Champaign, Ill. The trees were owned by the plaintiffs, and were directed to them at Mooresville, Ind. The United States Express Company undertook to carry the trees to Indianapolis, and there deliver them to some other carrier, to be transported to their destination. A written contract was made between the United States Express Company and the plaintiffs, which contained, among other things, these provisions: "That the person or corporation to whom the trees shall be delivered for transportation from the end of that company's line to their destination shall not be deemed the agent of the company, but shall be deemed the agent of the plaintiffs; that the company shall not be liable for injury to the goods unless it be proved to have occurred from the fraud or gross negligence of the company or its servants; nor shall any demand be made upon the company for more than fifty dollars, at which sum said property is hereby valued." There is no provision in the contract for the benefit of any carrier except the United States Express Company, nor is any other carrier named. The trees were delivered to the defendant in good condition at Indianapolis, and it carried them to Mooresville. After they had reached there, the plaintiffs went to the office of the defendant, prepared to pay the charges and receive the trees; and, although they were then in the possession of the defendant's agent, he denied that they had been received. On a subsequent day the plaintiffs went again to the defendant's office, received the trees, and paid the freight on them. The trees were so injured through the negligence of the defendant as to be utterly valueless. The plaintiffs had sold the trees to divers persons, and had agreed to deliver them on the 19th day of October, 1885. The refusal of the defendant to deliver the trees when first demanded caused the plaintiffs to lose the profits of the sales made by them, for the reason that the delay prevented them from delivering the trees to the purchasers in accordance with their contract.

The contention of the appellant is that the contract between the United States Express Company and the plaintiffs bound both them and the appellant; that the latter, when it accepted the goods for transportation, became bound to comply with the provisions of the contract, and secured a right to all its stipulations in favor of the first carrier; and that the contract continued in force for the benefit of all the parties until the goods were delivered at

Question in
Issue.

their destination. The opposing contention is that the contract between the United States Express Company and the plaintiffs did not inure to the benefit of the appellant, and that, when it accepted the goods for transportation, it received them under the law and became bound by the ordinary rules which prevail in cases where there is no special contract.

If the appellant had been designated in the contract with the first carrier as one of the intermediate carriers, or if the contract had provided that its stipulations should inure to the benefit of all the carriers, then the contention of the appellant would find strong support from the authorities. *United States Express Co. v. Harris*, 51 Ind. 127; *St. Louis, I. M. & S. R. Co. v. Weekly*, 50 Ark. 397; 35 Am. & Eng. R. Cas. 635; *Halliday v. St. Louis, K. C. & N. R. Co.*, 74 Mo. 159; 6 Am. & Eng. R. Cas. 433; *Evansville & C. R. Co. v. Androscoggin Mills*, 22 Wall (U. S.) 594; *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514; *Lamb v. Camden & A. R. Co.*, 46 N. Y. 271. But the contract does not provide that its stipulations shall inure to the benefit of any other carrier than the one with whom it was made, nor does it designate any other carrier along the line. Its provisions apply only to the carrier with whom the contract was directly made, and they leave it to that carrier to select the carrier from the termination of its line to the end of the route. The authorities are substantially agreed that in such a case the intermediate carrier cannot successfully claim the benefit of the provisions of the original contract. *Martin v. American Express Co.*, 19 Wis. 336; *Bancroft v. Merchants' Despatch Transportation Co.*, 47 Iowa 262; *Merchants' Despatch Transportation Co. v. Bolles*, 80 Ill. 473; *Camden & A. R. Co. v. Forsyth*, 61 Pa. St. 81; *Ætna Insurance Co. v. Wheeler*, 49 N. Y. 616.

When conditions inure to benefit of connecting carriers.

The rule declared by the decisions we have referred to is the only one that can be defended on principle, for where the contract designates only one carrier there is no privity between the owners and the designated carriers; but, where the contract is a through one, by designated carriers, there is a privity of contract, for it is justly inferable that the contract was intended for the benefit of all who perform services under it. So, too, where the contract declares that it is for the benefit of intermediate carriers it may be enforced, since it is a contract for the benefit of a third person, and, as it is beneficial to him, it is natural to presume that its terms were assented to and formed the contract under which the goods were transported. Where, however, the contract is solely for the benefit of the original parties it is not possible to apply this rule to it.

Where, as here, the names of the plaintiffs are given in full in the title of the cause, it is unnecessary to repeat them in alleging that the plaintiffs were partners. It is sufficient to allege that the plaintiffs were partners, without again giving their names.

**Pleading—
Partnership.**

The name of the defendant imports that it is a corporation, and it was therefore not necessary to specifically aver that it was a corporation. *Adams Express Co. v. Hill*, 43 Ind. 157; *Indianapolis Sun Co. v. Horrel*, 53 Ind. 527; *Sayers v. First Nat. Bank*, 89 Ind. 230.

**Averment of
incorporation**

The defendant's denial of the possession of the goods at Mooresville excused the plaintiffs from making a tender of the carrier's charges. A common carrier waives his right to detain goods for the freight if he puts his refusal to deliver them to the owner upon the ground that they are not in his possession at the place where a demand is fully made. *Vinten v. Baldwin*, 95 Ind. 433, and cases cited; *Mathis v. Thomas*, 101 Ind. 119; *Platter v. Board of Com'rs* 103 Ind. 360; *House v. Alexander*, 105 Ind. 109.

**Waiver of
tender.**

Where a corporation invests an agent with general authority to adjust claims against it, the declarations of that agent, made while endeavoring to secure an adjustment of the claim, are competent evidence against his principal. This general rule has often been applied in insurance cases, and must necessarily apply in such cases as this, for otherwise the corporation would be entirely without a representative.

**Admissibility
of agent's
declarations.**

In deciding, as we have, that the provisions of the contract with the United States Express Company cannot be taken advantage of by the appellant, we have disposed of the point that the damages are limited to \$50; but, if we are wrong in this still the limitation will not control, since there is evidence of negligence, and no evidence that a lower rate of freight was given on account of the limitation placed upon the value of the property. *Rosenfeld v. Peoria D. & E. R. Co.*, 103 Ind. 121, 21 Am. & Eng. R. Cas. 87; *Bartlett v. Pittsburgh C. & St. L. R. Co.*, 94 Ind. 281, 18 Am. & Eng. R. Cas. 549; *Express Co. v. Backman*, 28 Ohio St. 144. As there was evidence of negligence and no evidence that there was any special consideration inducing the owners to place a less value on their property than its actual worth, the limitation, even conceding it to be available to the appellant, as a part of the contract is nullified. The instructions of the court are quite as favorable to the appellant as the law warrants, and the evidence fully supports the verdict. Judgment affirmed.

**Validity of
stipulations
limiting lia-
bility.**

When Contracts Limiting Liability Inure to Benefit of Connecting Carrier.—See *Burroughs v. Grand Trunk R. Co.* (Mich.), 32 Am. & Eng. R. Cas. 467, note 474; *Taylor v. Little Rock, M. R. & T. R. Co.* (Ark.), 18 *lb.* 591, note 596; *Kiff v. Atchison T. & S. F. R. Co.* (Kan.), 18 *lb.* 618; note 16 *lb.* 241; *Whitworth v. Erie R. Co.* (N. Y.), 6 *lb.* 349; *Halliday v. St. Louis, K. C. & N. C. Co.* (Mo.), 6 *lb.* 443; note, 3 *lb.* 273.

McCONNELL

v.

NORFOLK & WESTERN R. CO.

(*Virginia Court of Appeals, June 13, 1889.*)

Carriage of Goods—Connecting Carriers—Liability for Damage.—In the absence of a special contract to deliver goods at a point beyond its line, the receiving carrier is not liable for loss or damage to the goods after their delivery to the connecting carrier.

D. Trigg and C. F. Trigg for plaintiffs in error.
Fulkerson & Page for defendant in error.

FAUNTLEROY, J.—This is a writ of error to a judgment of the circuit court of Washington county, rendered on 21st day of May, 1889, in an action of trespass on the case, in which T. G. McConnell and R. A. McConnell, partners under the firm name and style of T. G. & R. A. McConnell, are plaintiffs, and the Norfolk & Western Railroad Company is defendant. Facts. The material fact as disclosed by the record are as follows: The appellants, T. G. & R. A. McConnell, were shipping merchants, doing business at McConnell's Switch, a point upon the line of the Norfolk & Western Railroad, about a mile or more from Abingdon, in Washington County, Va. They were engaged in the course of their business in shipping carloads of ivy roots, and had previous and up to the 10th of June, 1885, loaded, at McConnell's Switch, and shipped as many as 300 to 500 carloads. Whenever they were ready to ship they notified the agent of the Norfolk & Western Railroad Company, at Abingdon, that they wanted a car placed upon their switch to be loaded by them; and, for their convenience, this was done by the said company. On the 10th day of June, 1885, the plaintiffs in error having notified the said agent of the said company at Abingdon that they wanted a car, and, having a car placed upon the said switch

for their use, loaded the car with their own hands, and under their own instructions, with 42,566 pounds of ivy roots; closed and secured the doors of the car themselves, and reported to the agent at Abingdon that the car was loaded and ready for shipment. It was the custom of the company not to issue a bill of lading for shipments from McConnell's Switch until the goods were actually in transit, and on the 11th of June the car, which had been loaded with ivy roots and reported ready for shipment by the plaintiffs in error, was taken into the train at McConnell's Switch by the conductor, and reported to the agent as having been actually shipped. Thereupon, the plaintiffs in error having complied with the customary requirement of the company for the prepayment of the freight upon 24,000 pounds of the shipment, a little over one-half of the whole freight, the excess to be paid and collected at the ultimate destination and delivery of the shipment, the company issued and delivered to the plaintiffs in error a regular bill of lading,—a printed form, with the blanks filled up with writing,—as follows: "Abingdon, June 11th, 1885. Received by Norfolk & Western Railroad Company of T. G. & R. A. McConnell, under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, (N. & W. 377. Rates from A, to New York, per 100 pounds, special, 29½ cts. Charges advanced, \$70.80. Paid,) in apparent good order and condition, (contents and value unknown,) viz: 1 car ivy roots, 24,000. To be weighed and excess charged ratably. Laden at McConnell's. Consigned to Frank & Weiss, at New York, to be transported by the Norfolk & Western R. R., to Norfolk, and there to be delivered to connecting railroad or water line, and so on by one connecting line to another, until they reach the station or wharf nearest to the ultimate destination. * * * It is mutually agreed that the liability of each carrier, as to goods destined beyond its own route, shall be terminated by proper delivery of them to the next succeeding carrier. * * *

The acceptance of this bill of lading is an agreement on the part of the shipper, owner, and consignee of the goods to abide by all its stipulations, exceptions, and conditions as fully as if they were all signed by such shipper, owner, and consignee. * * * This bill of lading shall have the effect of a special contract, not liable to be modified by a receipt from or any act of an intermediate carrier," etc. This bill of lading was forwarded to the consignees, Frank & Weiss, in New York, by the plaintiffs in error on the 11th day of June, 1885, the day upon which they received it. The car loaded with the ivy roots was transported to Norfolk by the Norfolk & Western Railroad just as it was loaded and sealed

by the plaintiffs in error, June 10, 1885, at McConnell's Switch, and was delivered by them to the connecting line, the Old Dominion Steamship Company, who received them and stored them in their warehouse in Norfolk on June 16, 1885, at the Old Dominion Steamship Company's wharf, and the Norfolk & Western Railroad Company had no control over them after they were so delivered.

On the 15th of June, 1885, a representative of the firm of Frank & Weiss, the New York consignees, called at the office of the assistant general freight agent, and of the notice clerk, of the Old Dominion Steamship Company, in New York, and stated that T. G. & R. A. McConnell had shipped to them a car-load of ivy roots, and that they would refuse to receive them; and immediately this information was conveyed to the agents of the Old Dominion Steamship Company at Norfolk, as follows: "New York, June 15th, 1885. Messrs. Culpeper & Turner, Norfolk, Va.—Dear Sirs: We are advised by Frank & Weiss, of New York, that T. G. & R. A. McConnell has shipped them a car-load of ivy roots, which they refuse to receive. Please notify the Norfolk & Western R. R. to that effect. Yours truly, W. L. GILLANDER, A. G. F. A." This was received and indorsed by Culpeper & Turner, as follows: "Norfolk, June 16th, '85. R. R. To Capt. J. F. Cecil, Agent: This from you, June 15th, N. & W. 377. Please advise disposition at once. CULPEPER & TURNER, Agents." Capt. J. F. Cecil was the transportation agent of the Norfolk & Western Railroad Company at Norfolk, Va., and he indorsed the paper: "R. R. W. F. Payne, Esq.: This shipment covered by McConnell's, W. B., No. 984, car N. & W. 377. Stamp date, June 15th, '85. Please get disposition as soon as possible. Res., J. F. CECIL, R." And on June 17, 1885, Capt. J. F. Cecil sent the following to the agent of the Norfolk & Western at McConnell's Switch: "June 17th, '85. R. R. Agent, McConnell's: Please note the attached is covered by your W. B. 984, June 11th. Give disposition at once. This the 2d trace. Res., J. F. CECIL, R."

It was the custom of the Old Dominion Steamship Company to notify consignees in New York of the arrival in Norfolk of consignments, which must be received at once in New York, upon their arrival, as they had no accommodations to store and protect them in New York, and to ask for orders. Accordingly the following was sent to Frank & Weiss: "To Messrs. Frank & Weiss, 339 B. Way, New York, June 17th, 1885—Dear Sir: We are advised that 1 car of ivy roots, consigned to you, has arrived at Norfolk. Please inform us when you will be ready to remove them from our wharf, that we may order them forward. We will endeavor to meet your

wishes as far as it is possible for us to do so. (N. & W. 377.) Res., W. L. GILLANDER, A. G. F. A." This was indorsed: "Refuse to Receive. FRANK & WEISS."

Mr. R. A. McConnell, one of the plaintiffs in error, was a witness, and in his testimony, on cross-examination, admitted that he was informed by E. S. Haney, the agent of the Norfolk & Western Railroad Company, at Abingdon, about two weeks after the shipment, that the consignees refused to receive the roots, and that he had known from two to four weeks previous to the 4th of August, 1885, that the shipment had not gone to its destination. On the 4th of August, 1885, he received the following: "Abingdon, Va., August 4th, 1885. To T. G. & R. A. McConnell—Gents: I am instructed by W. T. Payne, agent claims and expenses, to notify you that, unless you make disposition, within three days from the date of this letter, of the car-load of ivy roots shipped to Frank & Weiss, at New York, June 11th, '85, the same will be sold for charges. Yours, etc., E. S. HANEY, Agent." He admitted that he had received notice from New York, and from Mr. Haney, agent at Abingdon, that the roots were in Norfolk; that he had looked and made diligent search for the "other notice, which he had received from Mr. Haney, but cannot find it. He allowed the roots to remain in Norfolk until about the 1st of September, and then ordered their direction to be changed to Philadelphia, whither they were accordingly sent and delivered by his direction to Bales & Co., who reported them as totally worthless. These are the material facts in the record.

The suit was brought to recover damages against the Norfolk & Western Railroad for breach of their alleged contract, and the jury found a verdict in favor of the defendant company, which, upon motion, the court refused to set aside, and entered judgment upon the verdict.

We are of opinion that the verdict of the jury is right, and that there is no error in the judgment complained of. The defendant in error, the Norfolk & Western Railroad Company, did not undertake to transport the ivy roots to their place of destination, New York; but to transport them to Norfolk, its terminus, and there to deliver them to the connecting carrier. They were carried promptly to Norfolk, and there delivered to the connecting carrier, the Old Dominion Steamship Line, in whose warehouse, upon their wharf, they were safely and properly stored. Frank & Weiss, to whom they had been consigned in New York, advised of the fact that they had been shipped to them, by receipt of the bill of lading, which the plaintiffs in error had sent to them on the 11th of June,

Defendant not
liable under
contract.

1885, as early as the 15th of June, 1885, gave notice of their positive refusal to receive the consignment. This was promptly conveyed to the Norfolk & Western Railroad Company, and by them to the shippers, T. G. & R. A. McConnell, who took no steps or gave no orders concerning the disposition of the roots until some time in September, when they had become worthless. Even without the bill of lading or contract of shipment, the duty and responsibility of the defendant in error ended with the delivery of the roots to the connecting carrier. It is not contended by the plaintiffs in error that the delay and damage complained of occurred before the delivery by the defendant in error to the connecting carrier, in good order and in prompt time; and it is distinctly proved that the injury occurred while they were in the custody of the Old Dominion Steamship Company, by the refusal of Frank & Weiss, the consignees in New York, to receive them, and by the knowledge of the said refusal by and failure of the consignors, T. G. and R. A. McConnell, to give any direction or to make disposition of the roots until they were worthless.

The liability of a common carrier is restricted to its own route, unless it contracts to carry the goods to their ultimate point of destination; and such contract is not established by proof that the carrier accepted the goods with knowledge of their destination, and named the through rate for the same; and, in the absence of a special contract to deliver the goods at a point beyond its line, the receiving carrier is not liable for loss or damage occurring to the goods after their delivery to the connecting carrier. 3 Wood, Ry. Law, p. 1572, and note 3; *Hadd v. U. S. & C. Express Co.*, 16 Am. Rep. 757, 6 Am. & Eng. R. Cas. 445; *Michigan C. R. Co. v. Mineral Springs Manuf. Co.*, 16 Wall. (U. S.) 318; *Insurance Co. v. Wheeler*, 3 Am. Ry. Rep. 390; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. (U. S.) 123; *Evansville & C. R. Co. v. Androscoggin Mills*, *Id.* 594.

The plaintiffs in error do not claim or pretend to have been ignorant of the limitations contained in the bill of lading which was issued to and received by them. On the contrary, they themselves proved that they shipped hundreds—from 300 to 500—car-loads of ivy roots, and had been engaged in that business at that place for many years; and the presumption is that they were well acquainted with the terms of the bills of lading issued by the defendants in error, and received by them in the conduct of this business of shipping ivy roots. But we have decided this case even without reference to the bill of lading, or the evidence of the contract containing express stipulations and

Liability of
receiving
carriers.

Limitations
in bill of
lading.

limitations upon the liability of the defendant in error. There were instructions given and instructions refused by the court, and numerous exceptions taken to the rulings of the court; but we think those that were given properly expounded the law of the case, and that those refused by the court were properly refused, because the evidence did not support or justify them. We think the judgment in the case is right, and it must be affirmed.

Liability of Connecting Carriers for Loss of Goods.—See *Hanson v. Flint & P. M. R. Co.* (Wis.), 37 Am. & Eng. R. Cas. 628; note 631; *Fox v. Boston & M. R. Co.* (Mass.), 37 *Ib.* 632; *Alabama Great Southern R. Co. v. Mount Vernon Co.* (Ala.), 35 *Ib.* 657, note 662.

GULF, COLORADO & SANTA FE R. CO.

v.

BAIRD.

(*Texas Supreme Court, November 26, 1889.*)

Connecting Carriers—Partnership—Ratification of Contract.—A contract was made between the "L. & N. R. Co., and its connecting lines" and plaintiff, by which it was agreed to transport certain live stock from Decatur, Ala., to Fort Worth, Tex. The contract stipulated that the liability of the L. & N. R. Co. should cease at its terminus. The cattle, after being carried over several lines, were carried to their destination in Texas, and delivered there by the defendant company, which also collected the whole charges for transportation. *Held*, that, as by a Texas statute defendant was compelled to receive the cars of connecting lines for transportation over its road, the acceptance of the cattle did not amount to a ratification of the contract; and that the evidence was insufficient to charge defendant with liability, as a partner of or joint contractor with the L. & N. R. Co. and other lines for injuries sustained by the cattle on other roads than its own.

APPEAL from District Court, Tarrant County.

Action by W. C. Baird against the Gulf, Colorado & Santa Fe R. Co. for damages for injuries sustained by certain cattle whilst in transit. Defendant appeals from a judgment for the plaintiff. The facts appear in the opinion.

Leake, Shepard & Miller and *J. W. Terry* for appellant.

Ball & McCart for appellee.

STAYTON, C. J.—On February 27, 1883, appellee delivered to the Louisville & Nashville Railway Company at Decatur, Ala., several car-loads of cattle for transportation to Fort Worth, Tex. At the time the cattle were shipped a written contract was made, the first part of which was as follows: "Live Stock Contract. Decatur, Ala., Station, Feb. 27, 1883. Agreement made between the Louisville & Nashville Railroad Company and its connecting lines, of the first part, and W. C. Baird, of the second part, witnesseth: That whereas, the said Louisville & Nashville Railroad Company and its connecting lines, as common carriers, transport live stock only as per above tariff, now, in consideration that the said party of the first part will transport for the said party of the second part one car-load of cattle [—— head, more or less] from Decatur to Fort Worth, Texas, station at the rate of one hundred and sixty-five dollars per car-load, and a free passage to the owner or his agent on the train with the stock [if shipped in car-load quantities], the same being a special rate, lower than the regular rate mentioned in the said tariff, the said party of the second part thereby relieves said party of the first part from the liability of a common carrier in the transportation of said stock, and agrees that such liability shall be only that of a private carrier for hire; and it is further distinctly understood by the parties hereto that all liability of the said Louisville & Nashville Railroad Company as carriers shall cease at New Orleans, when ready to be delivered to the owner, consignee, or carrier whose line may constitute a part of the route to destination." The shipping contract contains many other provisions not now necessary to refer to, and is signed by J. W. Golden, "agent of the company," and by appellee. No tariff of charges referred to is found in the record.

The substance of appellee's petition is thus correctly stated in brief of his counsel: "Plaintiff's petition contains two counts. In the first count he alleges, in substance, that on the 27th day of February, 1883, the defendant, being a common carrier of live stock, had been, and was at that time, doing business with other railway companies or connecting lines, and more especially with the Louisville & Nashville Railroad Company, the Galveston, Harrisburg & San Antonio Railroad Company, the Texas & New Orleans Railroad Company, the Louisiana, Western & Morgan Railroad Company, and the Louisiana & Texas Railroad Company; that defendant was at said date associated with said other companies and lines of railroads for the purpose of carrying live stock and other freight from Decatur, Alabama, to Fort Worth, Texas, and that these different railroads

Facts.

Petition.

formed a continuous line for the transportation of freight between said points, over which they, each and all, gave through bills of lading, and contracted with shippers for through rates, which contracts and bills of lading were mutually honored, respected, and carried out by said railroad companies, they apportioning the receipts among themselves; that on said date plaintiff delivered to defendant, and defendant, by and through the said Louisville & Nashville Railroad, as its agent, received at said Decatur, the cattle in controversy, to be carried to Fort Worth; that said defendant and its connecting lines, in violation of their duty as common carriers, and contriving and intending to injure him, etc., acted so negligently in the carriage of said cattle that they were delayed, mistreated, and starved to the extent of causing the death of a great number, and injuring the remainder, to his damage \$4,190. The second count restates the same cause of action, but alleges, in detail, that defendant's line of road proper extended from Rosenberg junction to Fort Worth, and proceeds to give the points at which the different lines of railroads connected with each other, forming a line from Decatur to Fort Worth. It then alleges that the cattle were delivered to the L. & N. R. R. at Decatur, to be transported from there to New Orleans, and from thence to Fort Worth; and that the said L. & N. Ry. agreed and undertook to carry same to Fort Worth for the price of \$150 per car-load; that said L. & N. Ry. did not furnish plaintiff with a bill of lading for his cattle, but after they had been loaded on the cars presented to him a printed contract, and required him to sign the same before the cattle were shipped out, and that he was forced, in order to get his cattle shipped, to sign same; that by the terms of said contract the liability of said L. & N. Ry. was to cease at New Orleans, but that there was no provision in said contract affecting the liability of any of the other lines of railroad which might carry the cattle to Fort Worth; that said cattle were thereupon carried by said L. & N. Ry. to New Orleans, where they were delivered to the L. & T. Ry., which carried them to Vermillionville, and delivered them to the L. W. Ry., which carried them to Orange, where they were delivered to the T. & N. O. Ry., which carried them to Houston, where they were delivered to the G., H. & S. A. Ry., which carried them to Rosenberg, where they were delivered to defendant railway, which carried them to Fort Worth; that at said place of Fort Worth defendant collected from plaintiff all the freight bills and feed bills, and all other charges for the whole route; that the Morgan road, which took his cattle at New Orleans, did not give him any bill of lading at all, nor did any of the roads between New Orleans

and Fort Worth; that these last named roads, from New Orleans to Fort Worth, formed a continuous and connecting line from New Orleans to Fort Worth, each recognizing and carrying out the contracts of the other, and making through rates over the other roads respectively," etc., "and, in substance, that the damage all occurred between New Orleans and Rosenberg junction."

Appellant alone was sued, and among other defenses it pleaded that neither the Louisville & Nashville Railroad Company, nor its agents at Decatur, Ala., had the right to contract with plaintiff for transportation of his cattle over its road; denied that the company or its agents had made a contract to transport cattle over defendant's line, or that it by contract was bound so to do, but that it had been accustomed, in obedience to the statutes of this state, to receive cars from the Galveston, Harrisburg & San Antonio Railway Company when tendered to it, whose connection with appellant's road was shown; and that if it received the cars loaded with cattle, as alleged, it received them at Rosenberg junction in cars of that company, upon its demand that they should be transported to Fort Worth by appellant, and that if it received compensation for such services this was not through any copartnership or other contract made with any of the railway companies named in plaintiff's petition, but a fair and reasonable rate charged by it for services rendered in accordance with its statutory obligation to transport cars of other companies, and that it transported the cattle to Fort Worth, and there delivered them to appellee, without injury while in its possession. In the next paragraph of the answer the defendant pleaded the contract to which we have referred, made it an exhibit, claimed the benefit of any of its provisions, and asserted that the express limitation to the effect that the Louisville & Nashville Railroad Company should not be bound beyond the terminus of its own line for the performance of the contract inured to the benefit of any carrier over whose line the cattle passed; and alleged, if the cattle were injured while in transit, this occurred while they were on the roads of other companies.

The proof showed that an agent of appellee, in charge of the cattle, was given free transportation by the several roads over which the cattle passed, and that appellant returned him in the same manner from Fort Worth so far as its line extended. The evidence shows that the cattle were carried to New Orleans without injury, and that *en route* to Fort Worth they passed over the several railways, as alleged in the petition. There was a great deal of evidence

Defense.

Evidence.

on behalf of plaintiff to show that the cattle received very severe treatment at New Orleans, and between New Orleans and Houston, and especially in the yards at Houston of the Texas & New Orleans Railway, and that a number of the cattle died, and the remainder arrived at Rosenberg, and were delivered to defendant, in a very bad condition. There was no evidence to contradict these facts. Plaintiff offered evidence to show that the cattle were badly treated at Belton, on the defendant's line, where they were stopped to be watered and fed; and defendant offered evidence tending to rebut the same. Otherwise, there was no delay or injury attempted to be proven on defendant's line. The evidence shows that most of the damage was done on the railway lines before delivery to defendant. When the cattle reached Fort Worth, plaintiff had to pay the agent of defendant the whole amount of the freight charges and feed from Decatur, Ala., to Fort Worth. The agent of defendant collected the money, and delivered the cattle to the plaintiff. The money was sent by the agent to the treasurer of the defendant at Galveston, whose business it was to settle with the other companies. The cattle came all the way from Decatur in the cars furnished at that point by the Louisville & Nashville Railway Company. Oscar G. Murray, a witness for defendant, testified as follows: "During the year 1883, I resided at Galveston, Texas, and was general freight agent of the G., C. & S. F. Ry. Co. My duties and powers as general freight and passenger agent of the defendant were to fix the rates to be charged for freight and passengers over defendant's road, and to make such arrangement for interchange of traffic with connecting lines as from time to time became necessary or desirable. I had occupied this position with defendant since August 1, 1880. It was my duty to make freight rates on the contracts of the character referred to above. Other agents employed by defendant under the direction of its traffic department were authorized, from time to time, to make rates for freight and passengers over the defendant's road, subject to my approval. To the best of my recollection, the defendant had not, during the year 1883, or at any previous time thereto, since August 1, 1880, any freight arrangement or partnership agreement with the Louisville & Nashville Ry. Co. The defendant did not at any time delegate any authority to the L. & N. Ry. Co., or to the agent of that company at Decatur, Ala., to make contracts for the shipment of plaintiff's cattle, or any other freight, over the G., C. & S. F. The defendant, from time to time, announced the rates at which it would accept upon shipments of cattle and other freight offered it for transportation by other railway companies con-

necting with it, which, together with the usual and customary rules regulating the receipts of freight in good order, and the interchange of cars, was the only arrangement which existed during the year 1883 applying to traffic received at Rosenberg or Houston from connecting lines, destined to Fort Worth. The defendant was under no contract to do this for the L. & N. Ry. Co., but acted only under a duty, imposed by the law of Texas upon all railroad companies, to receive and transport the cars and freight offered by all connecting lines. The defendant's facilities for shipping freight to the territory reached by its lines, and the rates as charged upon traffic received from connecting lines, were made known from time to time by furnishing such rates to the railway companies connecting immediately with the defendant's road, and for their information and guidance."

The charge given by the court made the liability of appellant for injuries resulting from the failure of duty in connecting lines to depend on the existence of a partnership between them, but contained no clear statement of the law, which, applied to the facts, would enable the jury to determine whether a partnership existed, though it may have contained a true statement of the law applicable to the liability of joint contractors, not partners, for failure of duty of one or more of them. Charges were asked by appellant, and refused by the court, which would have enabled the jury correctly to determine whether a partnership existed, but the charge in which this was done may have been faulty in another respect.

The main question in the case arises on an assignment of error which questions the sufficiency of the evidence to sustain the verdict against appellant. The contract evidently was one for the transportation of the cattle from Decatur, Ala., to Fort Worth, Tex., and it bound the Louisville & Nashville Railway Company to do this, through its own and connecting lines, for the stipulated price. It does not follow from this, however, that there was any joint obligation resting on each of the companies over whose lines the cattle might pass. If the Louisville & Nashville Railway Company had not authority, by virtue of the existence of a partnership between itself and the other lines over which the cattle were to pass, or by virtue of an agency conferred upon it by the other companies empowering it to make a contract which would bind them jointly, then the contract was simply the contract of the company that made it, by which it was bound to transport the cattle on its own line as far as that extended, and beyond that to furnish transportation through other lines.

Instructions.

In the absence of stipulations to the contrary, the company making the contract for through carriage would be responsible for a loss or injury occurring on connecting lines, through facts that would fix liability on it for a loss occurring while the cattle were on its own line. In other words, its liability would be that of a common carrier through the entire distance the cattle were to be transported under the contract. The company making the contract, however, as was done in this case, might lawfully contract that its liability as a common carrier should terminate when the cattle were safely transported over its own line, and delivered to the connecting carrier. The reason for this is that a common carrier is under no obligation to contract for the carriage of goods beyond its own line, and, when it assumes to impose an obligation on itself for the further transportation of freight, this must be done by contract, express or implied, in which it may stipulate that its liability as a common carrier shall cease with the safe delivery to the next carrier of the thing to be carried. In the absence of partnership or authority to make a joint contract binding on all carriers over whose lines freight is to pass, connecting lines are but the agencies employed by the contracting carrier to perform its own contract.

**Liability of
contracting
carrier.**

That a contract for through transportation over the connecting lines of several railway companies, as between themselves composing a partnership, or holding themselves out as such, is binding on all, and one responsible for the act of another, results from the fact that the contracting company has power so to bind all. It is upon the same ground, when no partnership exists, that several carriers may be jointly bound by a contract made by one in the exercise of an agency conferred on it by the others. It perhaps, but seldom, if ever, occurs that a partnership exists between several railway companies, and to us it is evident that the facts proved were not sufficient to show that any such relation existed between any two or more of the companies owning the lines of railway over which appellee's cattle were transported; and so, if we exclude the evidence offered by appellant from our consideration, the evidence as clearly fails to show that appellant ever did any act from which appellee could have understood that any co-partnership existed. It is not contended that there is evidence tending to show that appellant had expressly empowered the Louisville and Nashville Railway Company to make a contract by which it would be jointly bound with that company or any other. In the absence of proof of express authority, facts may be shown which will be sufficient to authorize a jury

**Through con-
tracts—Part-
nership.**

to find that the power actually existed, but we do not find such evidence in the record before us. The contract relied on does not, in terms, purport to be the contract of appellant, but does purport to be a contract between the company that made it and its connecting lines on the one part, and the shipper on the other. Not being named in the contract, appellant would have had no right whatever, when the cattle reached New Orleans, to have demanded that they should be sent over any road with which its own had any connection, unless such right was acquired through some prior arrangement with the company that executed the contract. That company might have sent the cattle to their place of destination through any other connection than that selected, and no carrier over whose road they were sent would have had any ground for complaint against that company or appellee by reason of anything that appears in the contract.

It might be true, however, if the shipping contract was in fact made for the benefit of appellant, but without prior authority, that it might make it its own by ratification, and with the other lines thus become bound; Ratification. but ratification cannot be presumed against appellant from the fact that it received the cars from another railway company, hauled them to their destination, and there collected the entire sum due for transportation. A railway company cannot be held to have ratified a contract from the fact that it performed some of the services contemplated by it, when it is not at liberty, contract or no contract, to refuse to render the service. At the time the cars in which the appellee's cattle were, were received by appellant, the law provided that "every such company shall, for a reasonable compensation, draw over their railroad, without delay, the passengers, merchandise, and cars of every other railroad company which may enter and connect with their railroad;" and it provided, in case of disagreement as to compensation, how this should be adjusted. Rev. St. art. 4251. Article 4253, Rev. St., provided penalty for failure to comply with the provisions of article 4251; and article 4255 further provided a mode by which railway companies could be compelled to render for other companies the services contemplated by article 4251. The regulation of these matters, and others intimately connected with them, has been extended by subsequent legislation. Act April 2, 1887, Gen. Laws, 110.

In the face of such legislation, the evidence should show something more than that a through shipment was made, which would require the freight to pass over several lines of railway to its destination; that a price was fixed for the entire transportation, and collected by the last carrier,—before

it ought to be held that this was a joint contract for transportation that would render each carrier liable for failure of duty on the part of other carriers in the connected lines. So far as the evidence shows, appellant may have collected and retained a sum sufficient to cover its local rates from Rosenberg to Fort Worth, although the entire sum would not have given the same compensation per mile to each of the connecting lines; but if it only retained out of the gross sum received a sum in proportion to the number of miles it hauled the cars, this would not affect the question, unless it was done in pursuance of a prior contract, voluntarily made. The manner in which the entire sum paid for the carriage of the cattle was collected was doubtless that usual and most convenient to all parties interested, and it very fully appears that appellee was not prepared when the cattle reached their destination at once to pay the freight due on them. No inference can be drawn from the facts proved that appellant collected the entire freight because entitled to do so as a joint contractor, rather than in part in its own right, and as to the balance, as agent for the other carriers who had assisted in the transportation. The law compelled appellant to furnish feed for the cattle, and that it did so, and collected sum due therefor, together with such sum as other carriers had so expended, does not tend to show that a partnership existed between any of them, nor that they were joint contractors, and therefore the one liable for the failure of duty on the part of another. Nor does the fact that transportation may have been given by each company over its line to a person who accompanied the cattle on their way to and return from place of destination tend to show a partnership or joint contract. The part of the contract which limited the liability of the Louisville & Nashville Railway Company as a common carrier to its own line, which it might lawfully do, is inconsistent with the holding that the contract was one made by a member of a partnership or joint contractor; and if there was no joint liability when the written contract was made, when did it come into existence, and whom does it bind? According to appellee's theory of the case, every carrier over whose line the cattle passed is liable for an injury received by them while on any one of the lines; but the contract declares that this is not true as to the only carrier who was bound by the contract, either for through or partial transportation.

Giving due weight to every fact proved by appellee, we deem them insufficient to fix liability on appellant for any injury to the cattle occurring while they were in the hands

of other carriers; and the evidence offered by appellant, uncontradicted by inferences fairly deducible from facts proved, or by the direct evidence of any witness, is such as to clearly show that the Louisville & Nashville Railway Company had no power to bind appellant by the contract made. Appellant is liable as a common carrier to appellee for any injury to his cattle while in its possession, unless relieved therefrom by the rules applicable to the transportation of that kind of property; but this is the extent of its liability under the facts proved. The court below should have granted a new trial, and for its refusal to do so its judgment will be reversed, and the cause remanded.

EXPOSITION COTTON MILLS

v.

WESTERN & ATLANTIC R. CO.

(*Georgia Supreme Court, October 9, 1889.*)

Connecting Carriers—Statutory Liability—Amendment of Declaration.—A declaration in an action against a railroad company sought to recover damages to machinery by reason of defendants' carelessness and negligence. Plaintiff offered an amendment alleging that defendant had received the machinery from a connecting road as in good order, and was therefore liable under Ga. Code, § 2084, which provides that in the case of connecting railroads "the last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage." *Held*, that as the original declaration stated a cause of action arising at common law, and the amendment a purely statutory liability, the amendment was properly rejected under Ga. Code, § 3840, which declares that no amendment adding a new and distinct cause of action shall be allowed, unless expressly provided for by law.

ERROR to City Court of Atlanta.

Action by the Exposition Cotton Mills against the Atlanta & Western R. Co. The case is fully stated in the opinion:

B. F. Abbott for plaintiff in error.

Julius L. Brown for defendant in error.

BLANDFORD, J.—1. The plaintiff brought his action against the defendant, in which he alleged that he had sustained certain damages to machinery by reason of the carelessness and negligence of the agents and servants of the defendant. When this case was here before at the

Case stated.

October term, 1888, it was then held (81 Ga. 522, 35 Am. & Eng. R. Cas. 602) that the evidence offered by the defendant, to the effect that the damage done to the plaintiff's property occurred upon a connecting line of railroad before the same had been received by the defendant, was admissible as a defense to the action; there being no allegation in the declaration at that time that the defendant had received the property as in good order. The case being reversed, and coming on for another trial before the court below, the plaintiff offered an amendment to the declaration to the effect that the defendant had received the property from a connecting road as in good order. This amendment was demurred to upon the ground that it was a new and distinct cause of action. The court sustained the demurrer, and the amendment was rejected, and this ruling is excepted to, and constitutes one of the errors complained of in this case.

Section 3480 of the Code provides that no amendment adding a new and distinct cause of action shall be allowed, unless expressly provided for by law. The original declaration was brought by the plaintiff for damages done to the plaintiff's property by the defendant, and was a good and sufficient declaration and, upon proper proof, the plaintiff could have recovered thereon. But the amendment offered and rejected by the court seeks to recover from the defendant by virtue of a statute of this state, (Code, § 2084,) which statute provides that,

**Amendment—
New cause of
action.**

“when there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus, and until delivery to the connecting road. The last company which has received the goods as ‘in good order’ [the words ‘in good order,’ it will be observed, being in quotation marks] shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability.” The liability of this company, according to this amendment, arises alone by virtue of this statute. The original declaration showed the liability of the company to be a common-law liability; and now it is proposed, by the introduction of this amendment, to sue the company upon a statutory liability. We are therefore of the opinion that this amendment introduced a new and distinct cause of action from that embraced in the original declaration, which we have seen, under the Code, cannot be allowed in this state. See the case of *Parmelee v. Savannah F. & W. R. Co.*, 78 Ga. 239.

2. The next error assigned is the decision and judgment of

the court in directing a verdict for the defendant and judgment thereon. We think this was error. As the case then stood, the court should have awarded a Judgment. nonsuit. The plaintiff admitted that the damage to the property was done on a line of road belonging to another company, before it was received by the defendant company. So we affirm the judgment, with direction to the court below to cause the verdict and judgment to be set aside, and enter a judgment of nonsuit in place thereof.

MEMPHIS & LITTLE ROCK R. CO.

v.

KERR.

(*Arkansas Supreme Court, November 2, 1889.*)

Stock-killing—Duty of Railroad Company to Keep Lookout.—A railroad company owes no duty to the owner of stock which has strayed upon its track, except to use ordinary and reasonable care at the time to avoid injury to it, and the engineer is not bound to keep a lookout for stock upon the right of way.

APPEAL from Circuit Court, Prairie County.

U. M. & G. B. Rose for appellant.

J. S. Thomas for appellee.

HUGHES, J.—This is an action to recover damages for the killing of a mule by the appellant's engine. The evidence for appellee tended to show that the mule was grazing Facts. upon the railroad track, and, when the train approached within about 150 feet of it, it ran down the track about 75 yards, and was struck by the engine and killed; that before it was struck the whistle was sounded several times, but that the speed of the train was not checked. The evidence for the appellant tended to show that the engineer first saw the mule when it came on the track, about 150 feet ahead of the engine; that the engineer, upon first seeing it, sounded the whistle, and called for brakes, and that he was unable to check the train after he first saw it, so as to prevent the engine from striking the mule; that he was keeping a close

lookout at the time. Verdict was given for plaintiff. A motion for new trial was overruled, and the railroad company excepted and appealed.

The court, by modifications of the instructions asked for by the appellant, charged the jury, in effect, that, if the proof showed that the servants of the company in charge of the train at the time were negligent in keeping a careful lookout, the company was liable. In *Little Rock & Ft. S. R. Co. v. Holland*, 40 Ark. 336, 19 Am. & Eng. R. Cas. 479, this court, by Judge SMITH said: "Ordinary care in the management of their trains is the measure of vigilance which the law exacts of railroad companies to avoid injury to domestic animals, and this means, practically, that the company's servants are to use all reasonable efforts to avoid harming an animal, after it is discovered, or might by proper watchfulness be discovered, on or near the track." If the intimation, *supra*, that a railroad company is liable if the engineer in charge of the train when stock is injured "might, by proper watchfulness, discover the animal, on or near the railroad track, in time to avoid injuring it," means that a railroad company owes to the owner of stock that stray upon its track a duty to keep a lookout to prevent injuring it, it states the rule too broadly. In *Kansas City S. & M. R. Co. v. Kirksey*, 48 Ark. 366, it is held that a railroad company owes no duty to the owner of stock which has strayed upon its track, except to use ordinary or reasonable care at the time to avoid injury to it, and that the engineer is not bound to keep a lookout over the entire right of way, and to apprehend danger when an animal is discovered upon it. The question as to the duty of an engineer to keep a lookout for stock upon the track did not arise in the case. Each case should be determined upon its peculiar circumstances. The extent of the duty which a railroad company owes to the owner of stock upon its track is that the engineer in charge of the train at the time shall use ordinary or reasonable care, after the stock is discovered by him, to prevent injury to it, and this negatives the idea that the engineer is bound to keep a lookout for stock. Several states, among them Tennessee and Alabama, have by acts of their legislatures altered the rule by making it the duty of the engineer to keep a lookout for stock. There is an obligation due to others from railroad companies to preserve a strict lookout while running their trains; and as the agents of the company, in the absence of circumstances leading to a different conclusion, are presumed to keep such lookout, it is a fair inference of fact for the jury that a watchful agent will see stock on or near the track, and they will then determine whether he has used ordinary or

reasonable care to prevent injury to it. It is error for the court to instruct a jury that it is negligence for a railroad company to fail to keep a lookout for stock. Reverse and remand.

Obligation of Railroad Companies to Avoid Injuring Trespassing Animals.

—The rule of the common law that the owner of animals is obliged to keep them on his own grounds, and is a wrongdoer if he suffers them to stray upon the ground of others, is followed in Delaware, Indiana, Kentucky, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Vermont and Wisconsin. See 7 Am. & Eng. Encyc. of Law, 890. This rule however, has not been adopted in Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Iowa, Mississippi, Missouri, North Carolina, Ohio, South Carolina, Texas and West Virginia; and in these states if the owner of lands would have an action for trespass by cattle, he must erect and maintain a sufficient fence. See 7 Am. & Eng. Encyc. of Law, 890; *Studwell v. Ritch*, 14 Conn. 292; *Baylor v. Baltimore & O. R. Co.*, 9 W. Va. 270.

In states which have departed from the common law rule, it is generally held that railroad companies are bound to exercise reasonable care and diligence to avoid injury to any animals which may be upon the track if the track has not been fenced. *Mobile & O. R. Co. v. Williams*, 53 Ala. 595; *Richmond v. Sacramento Val. R. Co.*, 18 Cal. 351; *Central R. Co. v. Davis*, 19 Ga. 437; *Rockford, R. I. & St. L. R. Co. v. Irish*, 72 Ill. 404; *Illinois Cent. R. Co. v. Baker*, 47 Ill. 295; *Illinois Cent. R. Co. v. Middlesworth*, 46 Ill. 494; *Illinois Cent. R. Co. v. Wren*, 43 Ib. 77; *Parker v. Duquesne S. W. R. Co.*, 34 Iowa, 399; *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66; *Alger v. Mississippi & M. R. Co.*, 10 Iowa, 268; *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172; *New Orleans, J. & G. N. R. Co. v. Field*, 46 Miss. 573; *Raiford v. Mississippi Cent. R. Co.*, 43 Miss. 233; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156; *Washington v. Baltimore & O. R. Co. (W. Va.)*, 10 Am. & Eng. R. Cas. 749; *Coyle v. Baltimore & O. R. Co.*, 11 W. Va. 94; *Baylor v. Baltimore & O. R. Co.*, 9 W. Va. 270. A contrary rule was adopted in Illinois in *Central M. T. R. Co. v. Rockafellow*, 17 Ill. 541; *Illinois Cent. R. Co. v. Reedy*, 17 Ill. 580; *Great Western R. Co. v. Thompson*, 17 Ill. 131, and *Chicago & M. R. Co. v. Patchin*, 16 Ill. 98; but these cases were overruled in *Illinois Cent. R. Co. v. Middlesworth*, 46 Ill. 494. And the same rule is applicable although the animal having been allowed to go at large, has been injured at a highway crossing; *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409; *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393; *Rockford, R. I. & St. L. R. Co. v. Rafferty*, 73 Ill. 58; *Shuman v. Indianapolis & St. L. R. Co.*, 11 Ill. App. 472; or an incorporated town or other place where the company is not bound to fence the track. *Toledo, W. & W. R. Co. v. McGinnis*, 71 Ill. 346; *Rockford, R. I. & St. L. R. Co. v. Lewis*, 58 Ill. 49. It would appear that this rule applies although the owner of the animal may have been guilty of negligence, or even of positive wrong in permitting his animals to wander, or placing them upon the railroad track. *Needham v. San Francisco & St. J. R. Co.*, 37 Cal. 409; *Rockford, R. I. & St. L. R. Co. v. Irish*, 72 Ill. 404. In *Cincinnati & Z. R. Co. v. Smith*, 22 Ohio St. 227, the court held, that although the track in that case had been fenced, the servants of the company in operating its trains, were bound to use ordinary care to avoid injury to animals trespassing on the railroad; but in *Alger v. Mississippi & M. R. Co.*, 10 Iowa 268, it was declared that when the track was properly enclosed, the company was only liable for gross negligence.

The owner of domestic animals who allows them to run at large in the

neighborhood of an unenclosed railroad, takes the risk of loss and injury to them by unavoidable accidents; *New Orleans, J. & G. N. R. Co. v. Field*, 46 Miss. 573; *Raiford v. Mississippi Cent. R. Co.*, 43 Miss. 233; *Kerwhacker v. Cleveland, C. & G. R. Co.*, 3 Ohio St. 172; but it would appear that the only risk assumed is the risk of accidents which might not be avoided by ordinary care and watchfulness on the part of the agents and employees of the railroad company; *Little Rock & Ft. S. R. Co. v. Finley*, (Ark.), 11 Am. & Eng. R. Cas. 469; and railroad companies have the right to run their trains at a reasonable speed day and night, being controlled by custom and the exigencies of travel and freight, and not in any degree by the liability of stock to wander on the track; *Raiford v. Mississippi Cent. R. Co.*, 43 Miss. 233. But they are bound to use their locomotives with such care and diligence upon the road as would be exercised by a skillful, prudent and discreet person regarding his duty to the company and having a proper desire to avoid injury to property along the road and liable to be exposed to danger; *New Orleans, J. & G. N. R. Co. v. Field*, 46 Miss. 573. It has been declared that reasonable care on the part of railroad companies is such care and prudence in running their cars as a prudent man engaged in the same business would use in order to prevent injury. *Mississippi Cent. R. Co. v. Miller*, 40 Miss. 45; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156; *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 22; *Vickers v. Hannibal & St. J. R. Co.*, 42 Mo. 198; *Tarwater v. Hannibal & St. J. R. Co.*, 42 Mo. 193; *Gorman v. Pacific R. Co.*, 26 Mo. 441. The inquiry in case of injury to cattle where the track is not fenced, should be whether under all the circumstances of the case the defendant exercised reasonable and proper care in running its engine to avoid injury to plaintiff's cattle, and the fact that the rate of speed was greater than usual, does not tend to show negligence on the part of the defendant. *Central O. R. Co. v. Lawrence*, 13 Ohio St. 66.

In some of the states in which the common law rule as to the obligation of the owner of cattle to keep them within bounds has been adopted, it has been held that there can be no recovery for injuries to cattle except the railroad was guilty of wantonness or willfulness in destroying or injuring them. See *Darling v. Boston, & A. R. Co.*, 121 Mass. 118; *Maynard v. Boston & M. R. Co.*, 115 Mass. 458; *McDonnell v. Pittsfield & N. A. R. Co.*, 115 Mass. 564; *Eames v. Salem & A. R. Co.*, 98 Mass. 560; *Williams v. Michigan Cent. R. Co.*, 2 Mich. 259; *Vandegrift v. Rediker*, 22 N. J. L. 185; *Price v. New Jersey R. Co.*, 31 N. J. L. 229; 32 N. J. L. 19; *Spinner v. New York Cent. & H. R. R. Co.*, 67 N. Y. 153; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; 5 Denio (N. Y.) 255; *Bowman v. Troy & B. R. Co.*, 37 Barb. (N. Y.) 516; *Terry v. New York Cent. R. Co.*, 22 Barb. (N. Y.) 574; *Talmadge v. Rensselaer & S. R. Co.*, 13 Barb. (N. Y.) 493; *Clark v. Syracuse & U. R. Co.*, 11 Barb. (N. Y.) 112; *Mentges v. New York & H. R. R. Co.*, 1 Hilt. (N. Y.) 425; *Drake v. Philadelphia & E. R. Co.*, 51 Pa. St. 240; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101; *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298; *Fisher v. Farmers' Loan & Trust Co.*, 21 Wis. 74; *Bennett v. Chicago & N. W. R. Co.*, 19 Wis. 145; *Chicago & N. W. R. Co. v. Goss*, 17 Wis. 428; *Pritchard v. La Crosse & M. R. Co.*, 7 Wis. 222; *Stucke v. Milwaukee & M. R. Co.*, 9 Wis. 202. And this is so even though the enclosure in which the cattle were confined was kept well fenced and the owner was guilty of no actual negligence in allowing them to escape; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; 5 Denio (N. Y.) 225; nor does the company incur any liability although it has omitted to fence its track; *Marsh v. New York & E. R. Co.*, 14 Barb. (N. Y.) 364; or although it may have been guilty of negligence in failing to keep its cattle guards clear of snow and ice; *Hance v. Cayuga & S. R. Co.*, 26 N. Y. 428; and it has been held that the obligation of the railroad company to exercise care and vigi-

lance in running its trains for the safety of passengers, and for the purpose of avoiding injury to the buildings adjoining the track is not available to the owner of an animal wrongfully trespassing upon the road for the purpose of establishing the company's liability for injuries to it. *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255, 267.

The absolute freedom of railroad companies from responsibility for injuries to stock wrongfully upon their tracks, is not however, uniformly recognized by all the states which have adopted the common law rule. Thus, in Vermont, it has been held that railroad companies are bound to exercise such care and prudence to avoid injury as a man of ordinary prudence would use who was the owner of both the railroad and the cattle. *Bemis v. Connecticut & P. R. Co.*, 42 Vt. 375; 1 Am. Rep. 339; *Quimby v. Vermont Cent. R. Co.*, 23 Vt. 387. See also *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150; 60 Am. Dec. 246; *Trow v. Vermont Cent. R. Co.*, 24 Vt. 487. And in *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486, it was declared to be the duty of the railroad company to exercise reasonable care to avoid injury to cattle found on its road, although they might be there through the negligence of the owner.

In Kentucky, it has been declared that the paramount duty of a railroad company through its agents entrusted with the conduct of a train, is to look to the safety of persons and property thereon, subordinate to which is the duty to avoid unnecessary injury to animals straying on the road: *Louisville & F. R. Co. v. Ballard*, 2 Met. (Ky.) 177. If the injury could have been avoided by the agents of the company with due regard for the safety of the train and its contents, the company is liable; *Louisville & F. R. Co. v. Milton*, 14 B. Mon. (Ky.) 61, and the fact that the cattle were permitted to run at large will not preclude a recovery if the company's agents fail to observe proper care and diligence. *Kentucky Cent. R. Co. v. Lebus*, 14 Bush (Ky.) 518.

In Minnesota, the court has held that if an animal is on the track by the fault of the owner, he takes all reasonable risk of its being injured, but that the company is bound to use reasonable care to avoid injuring it, although it is not bound to presume that it will be upon the track: *Locke v. First Division, St. P. & P. R. Co.*, 13 Minn. 350; *Witherell v. Milwaukee & St. P. R. Co.*, 24 Minn. 410; *O'Connor v. Chicago, M. & St. P. R. Co.*, 27 Minn. 166; and by the exercise of reasonable care is meant making the same effort to avoid injuring an animal as a prudent man owning both train and cattle would make with regard to both; *Witherell v. Milwaukee & St. P. R. Co.*, 24 Minn. 410; but the duty of the railroad company to have a proper regard to the safety of cattle upon the track is subordinate to the duty which it owes as a carrier for the protection of the lives of those who are upon the train. *Witherell v. Milwaukee & St. P. R. Co.*, 24 Minn. 410.

In Indiana, where the owner of an animal has been guilty of such negligence as to allow it to stray upon the track of a railroad at a point where it cannot be legally fenced, he cannot recover unless the animal was killed by the gross negligence of the railroad company. *Jeffersonville M. & I. R. Co. v. Underhill*, 48 Ind. 389; *Jeffersonville M. & I. R. Co. v. Huber*, 42 Ind. 173; *Indianapolis C. & L. R. Co. v. Harter*, 38 Ind. 557. To entitle the owner of an animal killed at a point where the railroad cannot be legally fenced to recover therefor, he must show negligence on the part of the company and the absence of negligence on his part; *Jeffersonville M. & I. R. Co. v. Huber*, 42 Ind. 173; but if the animal is wantonly killed, it is no defense that the railroad was properly fenced at the place where the killing occurred. *New Albany & S. R. Co. v. McNamara*, 11 Ind. 543. In *Detroit, E. R. & I. R. Co. v. Barton*, 61 Ind. 293, it would appear to have been held that if the engineer could have avoided the killing by ordinary diligence

on his part, it must be deemed willful and that the company is liable. When by statute, cattle are permitted to run at large, no greater obligation is thereby imposed upon the railroad to avoid injuring them than rested upon it by the common law. *Michigan, S. & N. I. R. Co. v. Fisher*, 27 Ind. 96.

Same—Duty to Keep Lookout.—In the states in which the courts have departed from the common law rule, it is generally held that the engineer is bound to use ordinary care and diligence to discover any animals upon the track, and that if he could see them in time to avoid injury, the company is liable; *Alabama G. S. R. Co. v. Powers* (Ala.) 19 Am. & Eng. R. Cas. 502; *South & North Alabama R. Co. v. Williams*, 65 Ala. 74; *Memphis & L. R. Co. v. Sanders* (Ark.), 19 Am. & Eng. R. Cas. 497; *Little Rock & Ft. S. R. Co. v. Finley* (Ark.), 11 *Id.* 469; *Denver & R. G. R. Co. v. Henderson* (Colo.), 31 *Id.* 559; *Rockford, R. I. & St. L. R. Co. v. Rafferty*, 73 Ill. 58; *Paris & D. R. Co. v. Mullins*, 66 Ill. 526; *Rockford, R. I. & St. L. R. Co. v. Lewis*, 58 Ill. 49; *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226; *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 424; *Shuman v. Indianapolis & St. L. R. Co.*, 11 Ill. App. 472; *Kansas City, Ft. S. & G. R. Co. v. Hines* (Kan.), 19 Am. & Eng. R. Cas. 495; *Missouri Pac. R. Co. v. Reynolds* (Kan.), 13 *Id.* 510; *Missouri Pac. R. Co. v. Wilson* (Kan.), 11 *Id.* 447; *Fossier v. Morgan's Louisiana & T. R. Co.*, 1 *McGloin* (La.), 349; *Cincinnati & Z. R. Co. v. Smith*, 22 Ohio St. 227; *Washington v. Baltimore & O. R. Co.*, (W. Va.), 10 Am. & Eng. R. Cas. 749; *Baylor v. Baltimore & O. R. Co.*, 9 W. Va., 270; and a similar rule has been adopted in Kentucky and Vermont where the common law is followed; *Kentucky Cent. R. Co. v. Lebus*, 14 Bush (Ky.), 518; *Louisville & N. R. Co. v. Wainscott*, 3 Bush (Ky.) 149; *Bemis v. Connecticut & P. R. Co.*, 42 Vt. 375; 1 Am. Rep. 339. But in determining whether the engineer kept a proper lookout, the jury must consider his other duties which may interfere with the constancy of observation; *East Tennessee V. & G. R. Co. v. Bayliss* (Ala.), 19 Am. & Eng. R. Cas. 480; and the requirement to keep a lookout is met when he bestows on the service the watchfulness which his other duties would allow a prudent person to give it; *East Tennessee, V. & G. R. Co. v. Bayliss* (Ala.), 22 Am. & Eng. R. Cas. 596; and the mere fact that the engineer did not discover the animals until the engine was close upon it, is not sufficient to show want of ordinary care. *Bemis v. Connecticut & P. R. Co.*, 42 Vt. 375; 1 Am. Rep. 339. The fact that the railroad was fenced at the place of collision with the trespassing animals, is a circumstance to be considered in connection with other circumstances, in determining whether the engineer was guilty of negligence in not looking ahead and discovering the danger in time to avoid it; *Cincinnati & Z. R. Co. v. Smith*, 22 Ohio St. 227; and the jury may also take into consideration in determining the question of negligence, the imperfect light and fog which existed at the time of the collision; *St. Louis, I. M. & S. R. Co. v. Vincent*, 36 Ark. 451; but the company is not bound to run the train at such a rate of speed that it may be stopped within the distance at which the headlight of the locomotive would discover objects upon the track, and the question of recklessness or excessive speed must be determined by all the facts and circumstances of the case. *Louisville & N. R. Co. v. Milam*, 9 Lea (Tenn.), 223. The operation of a train with the engine behind was held not to be negligence where a man was stationed at the front end to keep watch and the train was moving slowly. *Falconer v. European & N. A. R. Co.*, 1 *Pugsley* (N. B.) 179. In Minnesota, where the common law rule is followed, it has been held that the engineer is not bound to keep a lookout for animals wrongfully upon the track, and that the owner of the animals cannot recover on the ground of the neglect of the company to fulfill the duty which it owes its passengers to use watchfulness and diligence to avoid injury to them. *Locke v. First Division, St. P. & P. R. Co.*, 15 Minn. 350.

Stock-killing—Duty of Engineer to Keep Lookout—Instructions.—Where the court charged the jury that "the law required the engineer to keep a steady lookout ahead for obstructions on the track," such instruction must be construed as imposing a relative, and not an absolute duty, and if the defendant believed that such charge would tend to mislead the jury, he ought to require a counter-charge making prominent the fact that other duties besides that of keeping a lookout for obstructions devolved upon the engineer. *Western Ry. of Alabama v. Lazarus*, Ala. Sup. Ct., Dec. 19, 1889. *SOMERVILLE, J.*, who delivered the opinion of the court, said: "The court charged the jury that 'the law required the engineer to keep a steady lookout ahead for obstructions on the track,' and to this charge exception was taken. We have said, in discussing this subject, that 'a watchful lookout must be steadily maintained for the discovery of obstructions on the track,' and that 'a failure to maintain a steady lookout is itself culpable negligence.' *Mobile & G. R. Co. v. Caldwell*, 83 Ala. 196. These expressions are substantially synonymous in meaning with that used by the court; and, if their tendency was to mislead the jury, this should have been corrected by requesting a counter-charge making prominent the fact that other duties besides that of keeping a lookout for obstructions devolve on the engineer, which may often prevent the constancy of his uninterrupted observation, and that a proper attention to these duties would not impute negligence. A 'steady lookout' must not be construed to be an absolute, but a relative duty. The tendency of the first charge may have been misleading, but the charge itself was not erroneous."

Same—Lookout—Animals in Proximity to Track.—It is error to charge the court that it was the duty of the engineer to use all proper means to prevent injury to the cow if he saw, or ought to have seen her in dangerous proximity to the track, and, that under the circumstance, he ought to have slowed the train. *Western Ry. of Alabama v. Lazarus*, Ala. Sup. Ct., Dec. 19, 1889. The court said: "To say that the presence of animals in dangerous proximity to a railroad track would call for the same exercise of diligence as if they were actually on the track would be an incorrect statement of the law. The statute provides that the engineer must, 'on perceiving any obstruction on the track, use all the means within his power, known to skillful engineers, such as applying brakes and reversing engine, in order to stop the train.' Code 1886, § 1144. The railroad company is made liable for any injury to persons or stock, or other property, resulting from a failure to comply with this requirement, or from any other negligence on the part of the company or its agents. *Id.* § 1147. We may suppose a case where animals are in dangerous proximity to the track when discovered, but the reasonable indications are that they are about to move out of the range of danger. In such event there would be no duty to stop the train. Such requirement would be both unnecessary and unreasonable. The duty to check the train would exist only where the engineer either discovered, or, by the use of due diligence, ought to have discovered, the animal in dangerous proximity to the track, and under circumstances indicating either that it would be likely to move on the track, or else probably be injured if it remained stationary. *Western R. Co. v. Sis-trunk*, 85 Ala. 352."

Same—Probability of Cattle Being on Crossing.—Plaintiff claimed damages for the killing of nine cattle at different times at the same point in a period of two years. The evidence showed that the train which struck the cattle was, on each of the times named, running on its usual schedule time, and at the rate of 35 to 38 miles an hour; that the air brakes were in perfect order; that the usual signals for the crossing were given; that the headlight on the engine was burning; and that the cattle were seen by the engineer

in charge of the engine when it was about 300 or 350 feet from the crossing; that they could not have been discovered by the aid of the headlight at a greater distance; and that it was much more dangerous to the safety of the train to attempt to stop and strike an obstruction like cattle at a slow rate of speed than to keep up the speed. It further appeared that the train could not have been stopped so as to avoid the collision unless it was slowed down to a speed not to exceed 15 miles an hour before nearing the crossing. *Held*, that the evidence was not sufficient to show negligence on the part of the defendant, and that plaintiff could not recover simply on the ground that the speed of the train should have been reduced because cattle were likely to be on the crossing. *Connyers v. Sioux City & P. R. Co.*, Iowa Sup. Ct., Oct. 11, 1889.

CARLTON

v.

WILMINGTON & WELDON R. CO.

(*North Carolina Supreme Court, December 9, 1889.*)

Animals—Obligation to Keep Lookout.—In an action for negligently killing a horse the court properly refuses to charge that the engineer is not required to stop his train when persons are on the ground near the track, and that greater care need not be shown when live stock is in a similar position, and properly instructs the jury instead, that it was the duty of the engineer to keep a lookout for stock on the track, and when discovered to use all the means he could, consistent with the safety of the passengers, to avoid injuring or killing the stock.

Same—Degree of Care Required of Engineer.—A request for an instruction that if the defendant proves he made every effort to stop the train and avoid the accident, after the horse was discovered, there was no negligence, is properly modified by making the test, not whether proper effort was used after the horse was discovered, but after by the exercise of a proper lookout he could have been discovered.

APPEAL from Superior Court, Duplin County.

Action by W. C. Carlton against the Wilmington & Weldon R. Co. to recover damages for negligently killing plaintiff's mare. The jury returned a verdict for the plaintiff, and judgment having been entered thereon, the defendant appealed.

Haywood & Haywood for appellant.

W. R. Allen for appellee.

CLARK, J.—It was not controverted on the evidence that

the plaintiff's mare was knocked off a railroad embankment in the day time by defendant's passenger train, and killed. The plaintiff's evidence tended to show that the mare, by a proper lookout, could have been seen by the engineer a distance of a mile and a half, the railroad being very straight at that point, and running through a level country. One of the plaintiff's witnesses testified that he saw the mare on the embankment, on the walk by the side of the track, when the train was a half mile off; that the embankment was 150 yards long, 10 feet high, and very steep; that the whistle did not blow till the engine was within 50 yards of the mare; that she jumped, and almost immediately was struck by the train; and that no effort was made to stop the train or slacken its speed. The testimony of defendant went to show that the mare came up the embankment 20 yards ahead of the engine, and too late to stop the train, which could not have been stopped, at the rate it was going, under 350 yards. There were no exceptions to the evidence.

Facts.

The instructions asked by defendant were given by the court, except the following: *First*. It is not required of an engineer in running trains to stop his train when persons are on the ground near the track, nor is there greater deference due to live stock than to human beings. *Second*. If the defendant used every effort to stop the train and avoid the accident after the mare was discovered, then there was no negligence, and the plaintiff cannot recover. *Third*. If an engineer in charge of the locomotive drawing a train discovers cattle either upon the track, or approaching the same, as if they were coming upon the track, blows his whistle, reverses his engine, and does all in his power to stop, and fails to do so, he is not negligent, and the plaintiff cannot recover.

Instructions.

The court, in lieu thereof, instructed the jury that "it was the duty of the defendant to keep a lookout for stock on the track in daylight, and when discovered to use all the means it could, consistent with the safety of the passengers and the operators on the train, to avoid injuring or killing them; that the main questions for the jury in this case were: (1) Was the horse on the track of the defendant company sufficiently long, after she could by the exercise of an ordinarily diligent outlook be seen by defendant or its employes running the train, to have been discovered, for the train to have had its speed slackened, or, if necessary to prevent the killing, stopped? (2) Were all the means that could, with safety to the passengers and operators, have been used, used by the defendant, after the horse could by an ordinarily diligent outlook have been discovered, to prevent the killing. (3) The

question as to the time the horse was discovered on the track by the engineer or other employes of the defendant company is not when it was actually seen, but when, by the exercise of ordinary care and diligence in looking out, it could have been seen; and this is a question of fact for the jury to find from the evidence; and the burden is upon the plaintiff to show to their satisfaction, by a preponderance of the testimony, that the outlook was not such as it should have been under the instructions above given, and that in consequence of the negligence of the defendant the horse was killed. (4) If, by an ordinarily careful outlook, the horse could have been discovered in time to have allowed the train to be stopped before killing the horse, and it was not so stopped, it would be negligence, and the plaintiff would be entitled to a verdict on the first issue, and your verdict should be, 'Yes:' provided you find from the evidence that the horse was on the top of the embankment. (5) If the jury find from the evidence that the horse came upon the track or embankment of the defendant company too near the engine and cars for the engineer, by the use of the appliances under his control, and which he could use with safety to the passengers and employes, to stop the train, before striking the horse, they will answer the first issue, 'No.'"

The defendant assigns as error the failure to give the instructions asked, and the instructions as given.

The first prayer for instruction asked and refused is based upon the idea that live-stock on the approach of the locomotive will show the same judgment and discretion as human beings under the same circumstances. "It was reasonably certain that the horse would be frightened," said the late chief justice in *Snow-*

den v. Norfolk S. R. Co., 95 N. Car. 93, "when he saw what was rapidly, in appearance, coming upon him, and would not remain quiet when it passed within three feet of him. He would be quite as apt, as he did in fact, after rushing a short distance along the ditch, to leap upon the road, as upon the opposite bank. This possible, if not probable, action would suggest itself to any careful and considerate person, and the necessity of being on the lookout, and taking proper precautions, such as slowing the locomotive, to guard against mishap and danger." But the proposition is too reasonable to need citation or discussion.

The charge as given, in lieu of the first prayer, is correct. The second prayer for instruction was substantially given, with the proper modification, that the test was not whether proper effort was used "after the mare was discovered, but after, by the exercise of a proper outlook, she could have been discovered." *Wilson v. Norfolk*

Proximity of
live-stock to
track.

Duty to keep
lookout.

& S. R. Co., 90 N. Car. 69, 19 Am. & Eng. R. Cas. 453.

The third prayer was substantially given. The defendant has no ground to complain because the exact language of its prayer is not given, if it is substantially given.

State v. McNeill, 92 N. Car. 812; Conwell v. Mann, 100 N. Car. 234. Indeed, the charge as given is open to the exception that it is too favorable for defendant in that the jury were instructed that the burden was on the plaintiff to show that the horse was killed in consequence of the negligence of the defendant. The action having been brought within six months after the cause of action accrued, the statute raised a presumption of negligence on the part of the defendant, and the burden is on it to rebut such presumption. Code, § 2326; Pippen v. Wilmington, C. & A. R. Co., 75 N. Car. 54; Wilson v. Norfolk & S. R. Co., 90 N. Car. 69, 19 Am. & Eng. R. Cas. 453. There is no error in the refusal of instructions, nor is there any in the charge as given, of which the defendant can complain. It is proper, however, to say that a general exception to a "charge as given," without specifying error, will not be considered in this court. This has been repeatedly held by this court in numerous decisions, and has been reaffirmed in Dugger v. McKesson, 100 N. Car. 1; Hammond v. Schiff, 100 N. Car. 161. No error. Affirmed.

Immaterial
error—in-
structions.

Stock-killing—Evidence as to Care Exercised by Engineer.—In an action to recover damages for the killing of stock, the engineer ought to be asked to testify as to his acts in attempting to avoid the injury, and the court properly disallows a question asking him whether he did all in his power to prevent the striking of plaintiff's stock. *Bullington v. Newport News & M. V. R. Co.*, W. Va. Ct. App., June 24, 1889.

KANSAS CITY, FORT SCOTT & GULF R. Co.

v.

BURGE.

(*Kansas Supreme Court, December 8, 1888, and May 10, 1889.*)

Stock-killing—Venue—Averment and Proof of Place of Killing.—In a statutory action to recover the value of a colt killed by a railroad company in the operation of its trains, the pleading must allege, and the evidence

show affirmatively, that the action is brought in the county in which the animal was killed.

Same—Judicial Notice of County in Which Locality is Situated.—Judicial notice will be taken of the location of Fort Scott, and of the boundaries of Bourbon county, and also that a place two miles distant from Fort Scott is within that county.

Same—Attorney's Fee—Sufficiency of Petition.—To recover an attorney's fee under the railroad stock law, it is not essential that the plaintiff should state in his pleading that the employment of an attorney in the case was necessary. A full statement of the facts concerning the injury and a prayer for an attorney's fee will sustain such a recovery.

Same—Animal Killed Upon Crossing—Liability.—In an action against a railroad company to recover the value of a colt, it appeared that the fence along the track was defective, and that the defect was known to the company. The animal was in the pasture adjoining the track in the evening, and about 9 o'clock at night was struck by the engine and killed. Witnesses testified that the hair of the colt was found on the posts at a narrow gap in the fence through which the colt crowded and that its tracks could be seen leading to the railway and down the track to a crossing where it was killed. Plaintiff sought to recover on the ground that the colt ran ahead of the engine into a cattle guard, and was there struck and thrown out on the highway where it was found. The engineer and fireman testified that it was standing on the crossing of the highway headed in the same direction that the train was going when it was killed, and the jury found that it was struck on the crossing. *Held*, that the fact that it was struck and killed on the crossing would not defeat recovery if it escaped from the pasture through the gap, and that the evidence was sufficient to sustain a verdict for the plaintiff.

ERROR to District Court, Bourbon County.

Action by W. M. Burge against the Kansas City, Fort Scott & Gulf R. Co. to recover the value of a colt killed upon defendant's railroad. Defendant brings error to review a judgment for the plaintiff.

Chas. W. Blair, Wallace Pratt, and I. P. Dana for plaintiff in error.

Wade, Biddle & Cory for defendant in error.

SIMPSON, C.—This action was commenced before a justice of the peace in Bourbon county, to recover the value of a colt killed by the railroad company in the operation of its trains in that county. There was an appeal to the district court, and a trial there. The only assignment of error necessary to consider here is that the record fails to show that the court had jurisdiction. Our statute requires that the action shall be brought in the county in which such animal was killed or wounded. *St. Louis & S. F. R. Co. v. Byron*, 24 Kan. 350, 2 Am. & Eng. R. Cas. 651. The petition filed in district court avers the killing in Bourbon county. The answer was a general denial. There was evidence given or offered at the trial that the killing occurred in Bourbon county. This being a jurisdictional fact, it must

not only be stated in the pleading, but must be affirmatively proved on the trial. Counsel for defendant in error made an elaborate oral argument, in which he insisted that the jurisdiction was inferentially shown by the record, because three or four of the witnesses examined stated that the killing occurred "at the crossing south of the cemetery crossing;" "south of here a mile or two;" "a couple of miles south of town;" and that "here" and "town" meant Fort Scott, the place of trial, and that judicial notice must be taken of the fact that Fort Scott is in Bourbon county. The trouble about this proposition is that jurisdictional facts must be positively alleged and positively proven, and that, while we might take judicial notice of the fact that Fort Scott is the county-seat of Bourbon county under some circumstances, yet we will not take judicial notice that a locality mentioned in the proof as being outside of that city is in Bourbon county. We have been unable to find a case wherein the jurisdiction of the court was sustained in a local action by the application of the rules of judicial notice as to geographical facts. We are very reluctantly compelled to conclude that the venue was not proved. The following cases support this conclusion: *Mitchell v. Missouri Pac. R. Co.*, 82 Mo. 106; *Ellis v. Missouri Pac. Co.*, 83 Mo. 372; *Backenstoe v. Wabash, St. L. & W. R. Co.*, 86 Mo. 492. It is recommended that the judgment be reversed, and a new trial granted.

PER CURIAM. It is so ordered; all the justices concurring.

The defendant in error filed a petition for rehearing and after argument the court rendered the following opinion, reversing its first decision.

JOHNSTON, J.—This was a statutory action to recover the value of a colt killed by the Kansas City, Fort Scott & Gulf Company in the operation of its railway. The principal question presented in this court was the sufficiency of the proof offered to show that the colt was killed in the county of Bourbon, where the action was brought and a negative decision was first given.

A re-examination of the case, in which for the first time we are aided by a brief of defendant in error, convinces us that the testimony given and the facts which come within the range of judicial notice show that the colt was killed in the county where the suit was instituted and tried. There was no direct testimony that the point where the accident occurred was within the limits of the county, but the proof did clearly establish that

Judicial notice of county boundaries.

it happened at a point within two miles of the place of trial, which we must know is Fort Scott; and it must be further judicially noticed that that point is in Bourbon county. A court is bound to take judicial notice of leading and permanent geographical facts and features of the county; at least, such are universally recognized within its territorial jurisdiction. In *Wharton on Evidence*, § 339, it is said: "A court sitting in a particular city is bound to know the general scenery of such city, and its divisions into streets and wards; the courts of a particular state to know the boundaries of the state, and its divisions into towns and counties, and the limits of such divisions; and of its judicial districts; the positions of leading cities and villages in such state; and the natural boundaries of the state." See, also, *Wood v. Fowler*, 26 Kan. 682; *City of Solomon v. Hughes*, 24 Kan. 211; *Hoyt v. Russell*, 117 U. S. 401; *Wade*, Notice, § 1410.

It is well settled that notice will be taken by the courts of legislative acts of a public nature without proof of their existence, and Fort Scott having been incorporated, and its boundaries defined by a public act, judicial notice must be taken of its location. *Ter. Laws* 1860, chap. 54; *Prell v. McDonald*, 7 Kan. 426. And for the same reason judicial cognizance must be taken of the boundaries of Bourbon county. *Comp. Laws* 1885, chap. 24, § 8. The location of Fort Scott and the limits of the county being known, the court cannot fail to recognize that the point two miles from Fort Scott is within the county. In an action in Indiana, under a railroad stock law similar to ours, where the evidence showed that the animals were killed between two named geographical points,—that is, between London and Shelbyville,—but did not show in terms in what county it occurred, the supreme court of that state held that the court trying the cause could take judicial notice of the places named, and that they were within Shelby county. *Indianapolis & C. R. Co. v. Moore*, 16 Ind. 43. In a like case, before the same court, it was urged that there was no proof that the animal was killed in Boone county, where the trial occurred. The testimony was that it was killed about half a mile northwest of Hazelrigg station, and it was there held that notice should be taken of the location of the place designated, and that it was within Boone county. *Indianapolis & C. R. Co. v. Stephens*, 28 Ind. 429; *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 502; 19 Am. & Eng. R. Cas. 581, a recovery was sought for a horse killed in Parke county. The testimony established the fact that the injury occurred on the railroad one mile north of Rosedale, but did not expressly show the county in which it happened. It was held that the court would take judicial notice of the

geography of the country, and must judicially know that a point on the railroad a mile north of Rosedale would be in Parke county. See, also, *Indianapolis & C. R. Co. v. Case*, 15 Ind. 42; *Louisville, N. A. & C. R. Co. v. Hixon*, 101 Ind. 337. The Missouri cases cited by plaintiff in error, where it was held that the court would not infer that a point named was within a certain township, were brought under a statute which provides that such actions shall be brought before a justice of the peace of the township in which the injury happened or an adjoining township. There the township lines are subject to change, and are made and unmade at the discretion of a local tribunal; and the cases differ greatly from this one, where the location of the city and the boundaries of the county are fixed by public legislative acts.

The other objections to the judgment must also be overruled. It is contended that no facts were stated in the bill of particulars which would warrant the allowance of an attorney's fee. There was no statement in the pleading that it was necessary to employ an attorney in the case, but the facts were fully stated respecting the occurrence of the injury, and then in the prayer judgment was asked for the value of the colt, and also for an attorney's fee of \$35. This was sufficient. *Missouri Pac R. Co. v. Abney*, 30 Kan. 41; 13 Am. & Eng. R. Cas. 650.

Attorney's
fee.

The sufficiency of the evidence is challenged, but we think there was enough to uphold the verdict. It sufficiently shows that the fence along the track, and which formed a part of the inclosure from which the colt escaped, was defective, and that this defect was known to the company. The animal was in the pasture adjoining the track in the evening, and about 9 o'clock at night it was struck by the engine, and killed. Witnesses testified that the hair of the colt was found on the posts at the narrow gap in the fence through which the colt crowded, and that its tracks could be seen leading to the railway, and down the railway track to a crossing, where it was killed. The theory of the plaintiff below, and there is some testimony tending to sustain it, is that the colt ran ahead of the engine, into a cattle-guard, and was there struck and thrown out on the highway, where it was found. The engineer and fireman state that it was standing on the crossing of the highway, headed in the same direction that the train was going, when it was killed; and the jury found that it was struck on the crossing. But the fact that it was struck and killed on the crossing of the highway will not necessarily defeat a recovery. If it escaped from the pasture through the gap, and the injury occurred through the failure of the company to properly fence its road,

Sufficiency of
evidence.

then a liability under the statute arises. Of course, if it went upon the track over the highway, and not through the fence of the company, the owner could not maintain the action; but where the lack of a fence furnishes the opportunity for the injury, and it occurs for that reason, the statute applies, and the liability for the injury may be enforced. Upon competent testimony, the jury specially found that the colt went upon the track through the defective fence, and by the general verdict it was necessarily found that the injury resulted from the failure of the company to provide a good and lawful fence. The objections on the ground of variance and to the charge of the court are not well taken. The former order of reversal will be set aside, and the judgment of the district court affirmed. All the justices concurring.

Stock-killing—Statutory Liability—Compliance with Statutory Provisions.—

When a cause of action for the killing of stock is conferred by statute, the provisions of the statute in regard to the loss, ownership, and appraisement of value of the animals before the commencement of the suit must be complied with, in order to support a judgment for the plaintiff. *Union Pac. R. Co. v. Sternberg*, Colo. Sup. Ct., June 26, 1889.

Same—Pleading—Averment of Negligence.—An averment in the complaint in an action for the negligent killing of a cow that the engine was "so negligently operated by defendant's agents that plaintiff's cow was killed" coupled with the further allegation that "said cow was killed on account of said negligence" is sufficiently explicit to show that the damage done the animal resulted from the alleged negligence of such agents, and therefore of the defendant itself. *Western Ry. of Alabama v. Lazarus*, Ala. Sup. Ct., Dec. 19, 1889.

Same—Statutory Liability—Misjoinder—Damages by Fire.—In a statutory suit against a railroad company before a justice of the peace under Colo. Gen. Stat., chap. 93, div. 5, to recover damages for the killing of stock, an amendment offered by the plaintiff adding a claim for damages for the burning over of grass land, states a new cause of action requiring different proof and a different defense from the original statutory action and ought not to be allowed. *Union Pac. R. Co. v. Sternberg*, Colo. Sup. Ct., June 26, 1889; citing *Givens v. Wheeler*, 5 Colo. 598.

Same—Damages—Instruction.—The jury having fixed the damages at \$200, the value of the horses ascertained by the witnesses other than the plaintiff, without reference to any peculiar or particular value, it was not error in the court to reject the following instruction asked for by the defendant, as the defendant was not prejudiced thereby: "The court instructs the jury that while the measure of damages is the value of the stock when killed, that value is the market value of such stock, and not some peculiar or particular value attached to it by plaintiff." *Bullington v. Newport News & M. V. R. Co.*, W. Va. Sup. Ct. App., June 24, 1889.

Same—Damages—Tender of Payment—Effect.—Where the defendant, in an action to recover damages for killing stock, admits the killing and pleads a tender of \$60 in payment of the value of the animals killed, the only question in issue is the value of the animals, and it is unnecessary to charge that the jury must find whether plaintiff was the owner of the stock and whether it was running at large, and whether the statutory notice was served on the defendant are at issue. If the court charges that if the stock were worth more than the \$60 tendered, the defendant is entitled to a verdict for double

damages, the instruction is equivalent to an instruction that the burden of proof was on the plaintiff to prove that the stock were worth more than the amount tendered. *Scott v. Chicago, M & St. P. R. Co., Iowa Sup. Ct., June 7, 1889.*

Same—Evidence—Breed of Cattle—Value.—The fact that one of plaintiff's witnesses in an action to recover damages for the killing of a cow described it as a "Jersey cow," although it was shown to be a graded, and not a thoroughbred Jersey, is not prejudicial to the defendant, as the term used was generic and indicated a mere popular nomenclature. In an action to recover damages for the killing of a Jersey cow a witness as to the value of the animal stated that his estimate of value was based on what he designated as "a Jersey craze," which existed in the country about the time the animal was killed. *Held*, that the fact that his estimate was founded on such "craze" did not affect its admissibility but only its weight. Where it appears that the animal killed was a graded Jersey cow, the testimony of a witness as to the market value of thoroughbred Jerseys is inadmissible, the animal killed being of a different class. *Western Ry. of Alabama v. Lazarus, Ala. Sup. Ct., Dec., 19, 1889.*

Same—Negligence—Sufficiency of Evidence.—In an action for damages resulting from the killing of horses belonging to the plaintiff in such action, and which had strayed onto a railroad track, through an open gate in the fence erected along the sides thereof by the railroad company, the evidence showed that the train which killed said horses struck them in the night; that there was snow on the ground, which had laid there some time, and was packed solid; that a light snow had fallen on the night of the accident, but previous thereto. The train was running at a high rate of speed. From the tracks made in the recently fallen snow, it was apparent that the horses had run at a rapid rate of speed in front of the engine for some distance, but were finally caught, thrown from the track, and killed. This was *held* to be sufficient proof of negligence on the part of the railroad company to justify the submission of the question to the jury, and to sustain a verdict in favor of the plaintiff in the action. In such case the question of negligence was one proper to be submitted to the jury by the instructions. *Missouri Pac. R. Co. v. Vandeventer, Neb. Sup. Ct., Dec. 4, 1889.*

In an action to recover damages for killing a horse, the evidence showed that the horse was tied at a station on defendant's road, and that when the cars moved away from the station the horse became frightened, broke loose, and ran down the road in front of the engine. The engineer saw him and gave the cattle signal, the brakes were put on and the train came nearly to a stop. The horse disappeared, it being a dark night. The engineer blew off brakes and started the train moving at the rate of four or five miles an hour. The engineer and the fireman were on the lookout for the horse thinking, according to their testimony, that perhaps he would get on the track again. The engine had a good headlight, and after running about 600 yards from the place where they first slowed up, they discovered the horse again upon the track. The engineer immediately blew on brakes, reversed his engine and gave it steam, but it was a heavily loaded train and going down grade, and it was impossible to stop the train before reaching the horse. The place where the horse was killed was a small trestle, and the preponderance of the evidence was, that the horse's legs had fallen through the trestle and that he was lying upon the track. There was evidence introduced on behalf of plaintiff, that the horse was standing with his body across the track and remained standing until struck by the engine and killed. *Held*, that the evidence was insufficient to sustain a verdict for the plaintiff, and that a new trial was properly granted. *Moye v. Wrightsville & T. R. Co., Ga. Sup. Ct., Nov. 11, 1889.*

In an action to recover damages for the killing of a cow, the plaintiff showed that the cow had been killed and was found near the track of the railroad company. The company showed by its witnesses who were uncontradicted, that they saw the cow a little distance off from the track when the train was running down grade and very rapidly; that the cow turned and came upon the track, and that everything was done that could be done to prevent the injury, but that it was impossible to stop the train in time to prevent it. *Held*, that the evidence was insufficient to support a judgment for the plaintiff. *Western & A. R. Co., v. Trimmer*, Ga. Sup. Ct., Dec. 9, 1889.

Same—Instructions as to Negligence.—In an action for damages against a railroad company for killing stock upon their track, the following instructions, asked for and given at the instance of the plaintiff, are not erroneous, evidence having been introduced before the jury tending to prove the hypothetical statements therein contained: "(1) If the jury believe from the evidence that the defendant's engine and caboose killed the plaintiff's horses, and that the said caboose had upon it two brakemen and a conductor, and that the engine had the engineer and fireman aboard, and that while the alarm whistle was blowing no brake was applied upon said caboose, but that said engine and caboose chased said horses, and knocked them off without any apparent slowing of the train, then the said defendant is guilty of negligence, and the jury will find for the plaintiff. (2) If the jury believe from the evidence that defendant's engine chased plaintiff's horses 600 or 800 feet, and that where said horses were struck said engine had not slacked its speed, then there was negligence on the part of the employees of the defendant to check or stop said train, and in that case they are instructed to find for the plaintiff. (3) If the jury believe from the evidence that the defendant's train killed plaintiff's horses, and that said train was a light train; that it had upon it two brakemen, a fireman, and engineer; and if they further believe from the evidence that the alarm whistle sounded 200 feet away from the horses, and that said brakemen and conductor took no steps to prevent the destruction of plaintiff's horses,—then, and in that case, there is not only a want of care, but negligence on the part of the defendant, and the jury will find for the plaintiff." *Bullington v. Newport News & M. V. Co.*, W. Va. Sup. Ct. App., June 24, 1889.

HUBER

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

(*Dakota Supreme Court, October 10, 1889.*)

Stock Killing—Burden of Proof—Effect of Statute.—The provisions of the Dak. Code Civ. Proc., § 679, that the killing or damaging of any horses or stock by cars or locomotives upon a railroad, shall be *prima facie* evidence

of negligence on the part of the railroad company, does not create any new liability, but merely changes the order of proof, and where the plaintiff has proved the killing, and the defendant has introduced uncontradicted testimony that it exercised proper care and precaution to prevent the injury the court ought to direct a verdict for the defendant.

APPEAL from District Court, Turner County.

Action by George Huber against the Chicago, Milwaukee & St. Paul R. Co. to recover damages for negligently killing a horse belonging to the plaintiff. Defendant appeals from a judgment for the plaintiff.

Barton Hanson and R. B. Tripp for appellant.

Gray & Warner for respondent.

SPENCER, J.—This action was brought to recover the value of a certain horse alleged to have been killed by and through the gross negligence of the defendant, its agents and servants. Upon the trial, the plaintiff proved ownership of the horse; that he was killed in Hutchinson county, this territory, by being run over by defendant's engine and cars; and his value, and rested his case. The defendant then proved, as a matter of defense, by the engineer, fireman, and brakeman who were in charge of the engine and train at the time the accident occurred, under averments in the answer proper for that purpose, that the accident occurred at a place where there was a down grade: that the train was moving at the rate of from 18 to 20 miles an hour; that the horse came upon the track on the left side, about 5 to 10 rods in advance of the moving train; that immediately upon seeing the horse the engine was reversed, the brakes applied, whistle blown, and everything done that was possible to prevent the accident; that the engine and cars were provided with the usual and necessary appliances for running trains of cars, and stopping the same; and that the train hands in charge of such engine and train were experienced men in the business, and competent for the service in which they were engaged. It was also in proof that the horse was hobbled. Some witnesses were sworn on behalf of the plaintiff in rebuttal, but nothing of consequence was elicited. The facts as testified to by the engineer, fireman, and brakeman were in no way contradicted, or attempted to be; nor was there any evidence tending to show that the engine and train were not properly equipped and managed, or that the accident could have been averted, or that the train could have been stopped, after the horse was first seen on the track, more expeditiously than it was. This was the condition of the case at the close of the testimony, and thereupon the defendant's counsel moved the court to direct a verdict in favor of

the defendant on the ground that the undisputed evidence, as matter of law, disproved any negligence on the part of the defendant, and that there was not any evidence of negligence sufficient to support a verdict against the defendant. The court denied the motion, and the defendant duly excepted. The plaintiff had a verdict, upon which judgment was rendered, and the defendant appealed.

Proof of the killing of the horse by the defendant was sufficient, had the case closed at that point, to have allowed the plaintiff to recover under section 679 of the Code of Civil Procedure. By said section it is provided, in substance, that the killing or damaging of any horses or stock by the cars or locomotives along a railroad shall be *prima facie* evidence of negligence by the railroad company. We think the design and effect of this statute is to create a presumption in law of the defendant's negligence in the cases specified, but not a presumption of fact. It cannot be presumed that the legislature intended, by this enactment, to make railroad companies liable for negligence or carelessness in cases where all the evidence in the case, taken together, proves, as a matter of fact, that there was no negligence. The effect of the statute is merely to change the order of proof. By it the killing of an animal by a railroad company, in the absence of any other evidence, is sufficient to allow the plaintiff to recover. This compels the company, in the event it desires to escape liability, to prove care on its part; to submit its witnesses to cross-examination; to show to the court that though, by the statute, it is presumed to have been careless because of the injury having occurred, yet that in fact it has not been guilty of any negligence. If, at the close of the case, it appears from the evidence that the defendant has not been guilty of carelessness; that the injury complained of was, in fact, not occasioned by the negligence or carelessness of the defendant,—there can be no recovery. If the evidence be conflicting; if there be any evidence that tends to prove that the act complained of was the result of negligence on the part of the defendant,—then the question is for the jury. The law does not create any new liability. Negligence, in fact, is as much the basis of the right to recover, in such actions, since the enactment of the statute as it was before. Under it the plaintiff has, in the first instance, only to prove the injury, to enable him to recover. The defendant then, if it be able so to do, proves that it was not negligent; that the injury was not occasioned by its carelessness. Having done this, it becomes the duty of the plaintiff to produce evidence tending to prove the defendant was in fact guilty of the negligence complained of. If he fail to do this, he is not entitled to recover.

Proof of killing—Presumption of negligence.

The statute is one of procedure merely; placing upon the defendant, in the first instance, if it desires to avoid payment of the value of the animal killed or injured, the duty of showing that it exercised proper care in the running of its trains to avoid the injury; that the act complained of was not occasioned by its carelessness or negligence. This having been done, the case proceeds as though the statute did not exist, and the case is to be determined upon its merits, under the evidence as to whether the defendant was in fact negligent; and under such circumstances, if there be no evidence of negligence in fact, there can be no recovery. In the case at bar, the plaintiff having proved the killing, and the defendant having showed that it exercised proper care and precautions to prevent the injury,—that it was not negligent,—and the plaintiff offering no evidence tending to prove that the horse was in fact killed by defendant's negligence, there was nothing for the jury to determine, and the motion of defendant should have been granted. The question here involved was passed upon by this court in the case of *Volkman v. Chicago, St. P. M. & O. R. Co.*, 5 Dakota 69; 35 Am. & Eng. R. Cas. 204, but we have deemed it proper to state somewhat more fully the grounds upon which our decision proceeded. *Grundy v. Louisville & N. R. Co. (Ky.)*, 2 S. W. Rep. 899; *Spaulding v. Chicago & N. W. R. Co.*, 33 Wis. 582; *Kentucky Cent. R. Co. v. Talbot*, 7 Am. & Eng. R. Cas. 585,—will be found also, to sustain the view herein expressed. The judgment appealed from must therefore be reversed, and a new trial ordered; all the justices concurring.

Presumption of Negligence in Actions for Killing Stock.—See *Volkman v. Chicago, St. P., M. & O. R. Co. (Dak.)*, 35 Am. & Eng. R. Cas. 204, note 206.

JONES

v.

BOND.

(*U. S. Circuit Court, S. D., Mississippi, E. D., Sept. 25, 1889.*)

Injuries to Animals—Presumption of Negligence—Conflicting Testimony.—The provision of section 1059, Miss. Code, 1880, that in actions against railroad companies for damage to persons or property, proof of injury in-

inflicted by the running of locomotives or cars shall be *prima facie* evidence of negligence, only raises a presumption which may be rebutted by evidence on the part of the railroad company, and when such testimony is introduced, the controversy is to be decided upon the weight of the evidence.

Same—Killing Dog—Sufficiency of Evidence.—In an action for killing a dog, the evidence showed that there was a curve in the railroad at, or close to the place where it was killed; that the railroad at that point was in a deep cut so that the engineer could not see it at any great distance; and that it was on a down grade. The testimony of the engineer was that as soon as he saw the dog, he reversed the engine, sounded the alarm whistle and did all he could to avert the accident, and that the animal attempted to cross the track when he was run over and killed. The fireman testified that he was otherwise engaged, and did not see the accident, but did hear the alarm whistle and knew that the engine was reversed. Plaintiff's witnesses testified that they heard the whistle, but thought it was the whistle giving notice of the approach of the train to a town. *Held*, that the evidence was not sufficient to justify a judgment for the plaintiff.

AT LAW. Action for damages.

Harry Peyton for plaintiff.

W. L. Nugent for defendant.

HILL, J:—This case was submitted to the court, upon the questions of fact as well as law, upon petition, answer, and proofs. This petition, in substance, alleges that peti-

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tioner was the owner of a very valuable bitch, of the setter tribe, from which he semi-annually obtained a large number of puppies, that he sold for a large sum; that said bitch was of the value of \$150; that on the 19th day of January, 1889, she was on the track of the Vicksburg & Meridian Railroad, then being operated by the defendant as receiver under the orders of this court, and that, through the carelessness and negligence of said employes, the locomotive and passenger train, then passing over said road, ran over and killed said bitch, to the damage of petitioner \$150. The answer admits the killing of the animal, but denies that it was the result of any want of care on the part of the engineer, but, on the contrary, insists that it was unavoidable. Whether it was so or not is the only question to be decided under the proof taken and submitted by both parties. The testimony of the engineer and fireman running the train, taken together, if true, is a clear defense to the claim of petitioner. The evidence on the part of the petitioner makes a pretty strong *prima facie* case of liability.

The petitioner, by his counsel, relies upon section 1059 of the Code of 1880, which reads as follows: "In all actions against railroad companies for damage done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable

**Presumption
of negligence.**

skill and care upon the parts of the servants of such company in reference to such injury." The reason for this exceptional rule of evidence is that these injuries are often committed (especially on property) when no one else observes them except the employes operating the train; and this is often the case in regard to injuries done to persons. Hence, after the injury is admitted or proved, it is but reasonable that the railroad company, or the receiver, (as in this case,) having control of those who have the best opportunity to know, shall be called upon to explain how the accident or injury occurred. But I believe a fair construction of the statute is that, as soon as the *prima facie* case thus made out is rebutted by the evidence on the part of the defendant, the whole testimony is considered as in other cases, the presumption created by the statute from the fact of injury ceases, and the controversy is to be decided by the weight of the evidence on both sides. I am not aware of any ruling of the supreme court of the state to the contrary.

I have within my judicial experience, tried quite a number of cases for injuries to persons and property against railroad companies and receivers, from alleged carelessness and negligence on the part of employes operating railroad trains, and have read the opinions of the courts in many more cases, but this is the first dog case that has been brought to my attention, and therefore I am at a loss to know what rule to apply. I presume the reason that other cases of like kind have not been before the courts is that the dog is very sagacious and watchful against hazards, and possesses greater ability to avert injury than almost any other animal; in other words, takes better care of himself against impending dangers than any other. He can mount an embankment, or escape from dangerous places, where a horse or cow would be altogether helpless; hence the same care to avoid injuries to an intelligent dog on a railroad is not required on the part of those operating the trains that is required in regard to other animals. The presumption is that such dog has the instinct and ability to get out of the way of danger, and will do so, unless its freedom of action is interfered with by other circumstances at the time and place.

The proofs on both sides show that there is a curve in the railroad at, or immediately east of, the place where the bitch was killed, and that the railroad at that point is in a deep cut, so that the engineer could not see her at any great distance, and that it was on a down grade. The testimony of the engineer is that, as soon as he saw her he reversed his engine, sounded the alarm whistle, and did all he could to avert the accident; and that the animal attempted to

Killing of dog
—Duty of
company.

Testimony.

cross the track, when she was run over and killed. The fireman testifies that he was oiling some part of the machinery, and did not see the accident, but did hear the alarm whistle, and knew that the engine was reversed. The witnesses on the part of the petitioner testify that they heard the whistle, but thought it was the whistle giving notice of the approach to the town of Clinton, as it was about the place where such whistle is usually sounded. It is very natural that they should have reached this conclusion. It was the business of the engineer to sound the whistle; and he must be presumed to know more about it, and the purpose of sounding it than any one else. The fact that he was the employe of the defendant is not a sufficient reason for disregarding the weight to be given to his testimony. Besides, the fireman corroborates him in the statement that he sounded the alarm and reversed the engine. There is a difference in the testimony of Simpson, the only witness on the part of petitioner, who said he witnessed the accident, and the engineer, as to whether the animal was running along the track or crossing it when the killing occurred. The undisputed fact that she was cut in two parts about the middle of her body is strong corroborative evidence that she was crossing the track. A careful consideration of the testimony on both sides satisfies me that the petitioner has not made out, by the proof, a case entitling him to damage as alleged in his petition. As the case is a novel one, he will not be taxed with the defendant's costs, but will pay all the other costs, and his petition will be dismissed.

Dog—Presumption of Negligence—The fact of killing does not make it a *prima facie* case of negligence where the animal is a dog. *Wilson v. Wilmington & M. R. Co.*, 10 Rich. L. (S. Car.), 52.

JAEGER.

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

(*Wisconsin Supreme Court, November 5, 1889.*)

Fences—What are Deemed Depot Grounds.—A place two and a half miles distant from a city where there is a side track which is only used

for loading and shipping such tan-bark as may be brought to that point, and at which there is no depot building or platform, or other conveniences for receiving passengers or freight, and no agent, is not a depot in such a sense as to exempt the company from the obligation to fence the grounds.

APPEAL from Circuit Court, Marathon County.

Action by Frederick Jaeger against the Chicago, Milwaukee & St. Paul R. Co. to recover the value of a cow killed by the defendant's negligence. The defendant appeals from a judgment for the plaintiff.

John T. Fish, (Burton Hanson, of counsel,) for appellant.

Bardeen, Mybrea & Marchetti, for respondent.

ORTON, J. —This action was brought before a justice to recover as damages the value of the plaintiff's cow, alleged to have been killed by negligence on the track of the appellant's railroad where it was not fenced. Facts.

The justice dismissed the complaint, and on appeal to the circuit court the case was tried before a jury, and the court submitted to the jury only the question of the value of the cow and the verdict was \$31.35 damages for the plaintiff. This is an appeal from the judgment on that verdict. The main defense was that the place where the cow strayed upon the railroad was depot ground, and not required to be fenced. The contention of the learned counsel of the appellant is—*First*, that the evidence showed such place to be depot ground; and, *secondly*, that there was so much doubt about the question on the evidence that it should have been submitted to the jury. The facts as shown by the testimony are as follows: The place where the cow came on the track is $2\frac{1}{2}$ miles from the city of Wausau. There is there a switch track, 820 feet long, on the east side of the main track. The road was fenced on the west side, and on the east side, also, up to the first switch, and posts were being put up for a fence on the east side of the switch track, but the fence was not finished until after the cow was killed. The side track at that place was only used for loading and shipping tan-bark that might be brought to that point. There was no highway leading to this side track, and the right of way was only the ordinary width. Nothing had been brought to that point by the road for delivery. There was no depot building or platform to receive passengers or freight, no scales for weighing freight, and no water-tank, and there was no agent of the company there, and the place had no depot name, and was not a station. The only use of the side track was to ship tan-bark, a considerable amount of which was received and shipped during the year; and this was all the use made of it

for any purpose. This is substantially all of the evidence on the question.

If there was a depot at that point at all, it consisted solely of this side or switch track, so occasionally used for the shipment of but one commodity. If there was a depot at this point in such legal sense that the company need not fence their road on either side of it, then there was a depot almost anywhere and everywhere on their road where they had the same kind of a side track; and so on any railroad in the state. It might be cheaper to construct such side track than to build and maintain fences, and depots of this character might be numberless. But, seriously, was there a depot at this point, so that the company need not fence their road? There would seem to be no question about it. This place had but one of the characteristics of a depot. As a practical construction of their right, the company had already built a fence on the west side of this pretended depot ground, and were setting the posts for a fence on the east side; clearly indicating that the company did not think it depot ground. If these grounds are depot grounds the company ought not to fence them, to obstruct the public use; but the fences will probably have no such effect. No case can be found that holds that such a place is a depot, or that the grounds are depot grounds, so that they need not be fenced. *Fowler v. Farmers' L. & T. Co.*, 21 Wis. 77. In *Dinwoodie v. Chicago, M. & St. P. R. Co.*, 70 Wis. 160, the side track was near, and might be a part of, a regular depot, and the question was as to how far the depot grounds extended; but the law governing such case is laid down in such terms as to exclude this pretended depot in all essential particulars. The case of *McDonough v. Milwaukee & N. R. Co.*, 73 Wis. 223, was much stronger, and this court held that the jury rightfully found that the place was not depot ground. But the plainest principles of common sense would seem to determine that these grounds were not depot grounds, or used for depot grounds. Therefore there was no question about it to be submitted to the jury. The court correctly held that the place where the animal came on the track, and was killed, was not depot ground. The judgment of the circuit court is affirmed.

Statutory Obligation to Fence—Excepted Places.—See *Cox v. Minneapolis, S. S. & A. R. Co.* (Minn.), 38 Am. & Eng. R. Cas. 287, note, 289; *Johnson v. Chicago & N. W. R. Co.* (Iowa), 35 *Ib.* 131, note, 132; *Beckdolt v. Grand Rapids & I. R. Co.* (Ind.), 35 *Ib.* 168, note, 172.

Fences—Obligation to Erect—Side Tracks in City.—Where, from the agreed statement of facts in a case, it is made to appear that the corporate limits of a city, with buildings thereon, extend along one side of the various side tracks of a railway, the land on the other side not being platted; that

the side tracks thus established were necessary and proper for the transaction of the business of the railway; and that it would be inconvenient and unsafe to the employes of the company if a cattle guard and fence were erected—the railway company is not required to fence its tracks at that point and will not be liable for stock killed by its engines and cars at that place, unless guilty of negligence. *Chicago, B. & Q. R. Co. v. Hogan*, Neb. Sup. Ct., Nov. 6, 1889.

Same—Liability of Company.—Where the attorneys for the plaintiff and defendant agree in writing that certain stock killed by the engines of a railway company escaped without the fault of the owner, and was killed at a place where the court finds the company was not required to fence its track, and without the negligence of the railway company, there can be no recovery for such stock. *Chicago, B. & Q. R. Co. v. Hogan*, Neb. Sup. Ct., Nov. 6, 1889.

GALLAGHER

v.

NEW YORK & NEW ENGLAND R. Co.

(*Connecticut Supreme Court of Errors, January 11, 1889.*)

Fence—Obligation of Company to Erect Between Two Tracks.—The provisions of §§ 3505, 3507, Conn. Gen. Stat., that railroad companies shall fence their tracks except at such points as the railroad commissioners shall adjudge unnecessary, and that in the event of a failure to do so, any person suffering damage by reason thereof shall have a cause of action, do not require a railroad company to fence its track at a place where it is located 50 feet distant from and parallel to another railroad track upon the side next to the latter track, although the commissioners had never adjudged that the fencing of that part was unnecessary; and the company is not liable in damages for injuries to a horse which came upon the track at that point.

APPEAL from Court of Common Pleas, Fairfield County.

E. D. Robbins for appellant.

H. W. Taylor for appellee.

LOOMIS, J.—The plaintiff in this case seeks to recover the value of a horse killed by a locomotive engine on the defendant's railroad track in the town of Brookfield. For a considerable distance at and near the place of the accident the defendant's track and that of the Housatonic Railroad Company lie side by side, with an intervening space of land 50 feet wide. The defendant's track is located on the west side of the Housatonic road, and nearly parallel therewith. The defendant had erected and maintained a sufficient fence on its west side, where its road abutted on private fields, but on the other side, between the two railroad tracks, it had

Facts.

erected no fence, and none had been erected by the Housatonic Railroad Company on either side of its track. In September, 1887, the plaintiff had placed his horse in the care of his father, who before the accident had placed it with two other horses to pasture on his home lot, which adjoins the Housatonic Railroad on the east side, and is not separated from it by any fence. On the west side is a ditch, and the southerly side, abutting on land of one Andrews, is marshy. There was no fence between Andrews' land and the Housatonic Railroad, and horses could pass either across the ditch directly onto the railroad track, or over the marsh onto land of Andrews, and thence onto the track. On the 5th of October, 1887, while the plaintiff's father and his family were at breakfast, the horses passed from the home lot, by one of the routes mentioned, across the track of the Housatonic road, onto that of the defendant, where the plaintiff's horse was struck by the defendant's locomotive and killed. The defendant suffered a default, and moved for a hearing in damages, upon which the facts were found by the court below, and judgment rendered for the plaintiff to recover full damages. Two questions were made before the trial court, which have come to this court for review upon the defendant's appeal, namely: Do the facts show negligence on the part of the defendant? Do they show contributory negligence on the part of the plaintiff?

In regard to the defendant's negligence, there is no allegation in the complaint, nor was it claimed upon the trial, that it consisted in mismanaging the train in any respect, but it was predicated entirely upon the want of a fence between the two railroads. Upon this part of the case the decisive question is whether it was the duty of the defendant to erect such a fence: and this is a pure question of law, depending upon the true construction of § 3505 of the General Statutes, which is as follows: "Every railroad company shall erect and maintain fences on the sides of the railroads operated by it at such place or places as the railroad commissioners shall direct, and every railroad company operating any railroad constructed under any act of incorporation passed since the first Wednesday of May, 1850, or hereafter constructed, shall cause sufficient fences to be erected and maintained on the sides of such railroads, except at such place or places as the railroad commissioners shall adjudge them unnecessary, such fences to be erected by all companies hereafter organized within twelve months after they enter upon and take possession of the lands through which their railroads pass." And by § 3507 it is provided that "any person who without neglect on his part shall suffer damage by

Statutory obligation to erect fence.

reason of the neglect of any railroad company to erect or maintain fences, as required by law, may recover such damage from such company." The defendant, having been incorporated since the date mentioned in the statute, is subject to its provisions, whatever construction must be given to them. It is conceded, also, that the railroad commissioners have never passed upon the question as to a fence at this place, or adjudged the same unnecessary.

As this negates the only exception expressly mentioned in the statute, the defendant railroad is undoubtedly brought within the strict literal terms of the statute. So that the practical question before us is whether it is the duty of the court to administer and apply the statute according to its letter, or according to its intent and object. And here one of the approved canons of interpretation comes to our aid, namely, that the letter should not be followed where it leads to absurdity and injustice. Smith, Const. § 486; Dwar. St. 587; 1 Kent, Comm. (7th Ed.) side p. 462. What, then, would be the consequences should we interpret the statute in question according to its letter? Every railroad company incorporated since 1850 would, in the absence of any order from the commissioners, be required to fence both sides of its road, though the effect might be to cut off, or render extremely difficult, the ingress or egress of passengers at its stations, or the reception and delivery of freight. The language would even include places where the railroad track intersects public highways or other railroad tracks, or where it passes over rivers or bodies of water. Such results could not have been within the intent of the legislature. It is therefore our duty to discard a literal, and adopt a rational, construction. The manifest object of the act was to require fences to be built and maintained against private fields and lots where domestic animals might be feeding or stationed. It could not have been contemplated that animals requiring such protection would be on an adjoining railroad track, and it is obvious that a fence confining them to one track would ordinarily increase, rather than diminish, the risk of injury, since it would limit and narrow the facilities for escape from an approaching train.

In cases involving merely the construction of a local statute, we do not often resort to other jurisdictions for aid; but the dangers to domestic animals along the line of railways, as well as danger to persons and property being transported over such roads, have induced the legislatures of many states besides our own to pass laws requiring railroad companies to fence their roads, and, although we find no statute identical in its

Construction
of statute.

Company not
bound to
fence at place
in question.

provisions with our own, yet we find many cases where the courts have in construing these statutes, departed as widely, perhaps, from the letter as we have done in the present case, so that our position may be materially strengthened by reference to decisions in other states on this subject. In 1 *Thomp. Neg.* p. 519, § 24, it is said, in reference to such statutes: "It is obvious that there are places along the line of every railroad where it is impossible and improper for the road to be fenced—where, for instance, it is crossed by highways, or runs along a street, or at the depots, stations, etc., of the company, necessarily open for access by the public. In some instances these places are specifically excepted from the operation of the statute by its terms. In others the courts have held that such exceptions are necessarily implied, from the inconvenience which would follow any other interpretation." See, also, *Davis v. Burlington & Mo. Riv. R. Co.*, 26 Iowa, 549; *Indianapolis & C. R. Co. v. Kinney*, 8 Ind. 402; *Indianapolis, P. & C. R. Co. v. Crandall*, 58 Ind. 365; *Toledo, W. & W. R. Co. v. Chapin*, 66 Ill. 504; *Lloyd v. Pacific R. Co.*, 49 Mo. 199. For these reasons we conclude that the defendant was under no duty to fence the road at the place in question, and so the entire foundation upon which the trial court predicated the finding of negligence fails, and the judgment was erroneous.

As this first point is necessarily decisive of the whole case, it renders the next question, whether there was contributory negligence on the part of the plaintiff, immaterial. There was error in the judgment complained of. The other judges concurred.

Fences and Cattle Guards—Obligation to Construct—Crossing.—The general direction of what was known as F. street ran diagonally across plaintiff's track. It was not shown to have been regularly laid out or extended across the tracks. To the south side of the tracks, it deflected to the west and ended at the station grounds, and if it had been extended across the tracks in the same direction it could not have connected with what was called F. street on the north side. *Held*, that there was no continuous street at that point, and that therefore the railroad company was not required to fence its railway tracks at the crossing and provide cattle guards under Mich. Pub. Acts, 1887, p. 339. *Stern v. Michigan Cent. R. Co.*, Mich. Sup. Ct., Oct. 18, 1889.

Stock Killing—Pleading—Inconsistent Averments—Appeal.—In an action to recover damages for the killing of stock, the petition alleged that the cattle were killed at a point where the defendant had the right to fence its road, thus negating the idea that the cattle were killed at a public crossing. It also contained averments to the effect that the killing was caused by the negligent and careless operation of the defendant's trains, thus presenting the question of the liability of the company for the killing of stock at points where there was no right to fence, as at a public crossing. The defendant pleaded a general denial. The court charged the jury in substance that if the right to fence existed and there was no fence, the defendant was liable, but if the killing took place upon a public crossing, the

plaintiff must show that the damage was caused by the negligent and careless operation of the trains. *Held*, that an objection to the petition as containing inconsistent averments could not be made for the first time on appeal. *Connyers v. Sioux City & P. R. Co.*, Iowa Sup. Ct., Oct. 11, 1889.

ATCHISON, TOPEKA & SANTA FE R. Co.

v.

HAWKINS.

(*Kansas Supreme Court, October 5, 1889.*)

Stock-Killing—Crossing—Permitting Hedge to Obstruct View of Track.—

In an action brought by the plaintiff against a railroad company to recover the value of stock which plaintiff alleged were killed at a public crossing, by the negligence of the railroad company, the bill of particulars alleged, among other things, "that the whistle of the engine was not sounded as prescribed by law; and that in consequence thereof the stock were not warned of the approach of the train until it was too late to prevent them from being killed; and that if the whistle of the engine had been sounded, as prescribed by law, the person in charge of the stock could have prevented any injury." The bill of particulars further stated "that the railroad company permitted a very high and dense growth of hedge to extend out on its right of way, and nearly to the track;" and further stated "it prevented persons traveling upon the public road from observing the approach of trains." *Held*, that under the allegations of the bill of particulars it was misleading and erroneous to instruct the jury "if the railroad company permitted and suffered a hedge to stand upon its right of way, so as to obstruct the view of the track, and but for such obstruction the injury to the stock would not have happened, the company is liable for the injury to the stock."

Same—Appeal—Reversal of Verdict.—*Held*, also, that where it appears from the instructions and findings of the jury, under the allegations of such a bill of particulars, that the liability for the injury to the stock was fixed by the jury for the negligence of the railroad company in permitting the hedge to grow upon the right of way as alleged, the verdict and judgment must be set aside.

JOHNSTON, J., dissenting.

ERROR from District Court, Harvey County.

Michael Hawkins commenced his action against the Atchison, Topeka & Santa Fe Railroad Company before a justice of the peace of the city of Newton, in Harvey county to recover \$200. His bill of particulars was as follows, omitting caption: "The plaintiff complains of the defendant and alleges that defendant is a corporation duly organized under the laws of the state of Kansas, and that it owns and operates a line of

railroad through the county of Harvey, in said state, and did at all of the times herein mentioned; that the plaintiff was, on or about the 14th day of August, 1885, the owner of two cows of the value of \$150; that on said day said cows were in his possession, and were being driven by a competent person along the public highway, upon and along the section line road between section No. 30, township 23, range 1 E., and section No. 25, township 23, range 1 W. in Harvey county, Kan.; and that at a point where said public highway crosses defendant's said railroad said cows were, through the carelessness and negligence of defendant's servants and employes, who were in charge of a certain engine and train of cars, in the management thereof upon its said railroad track, struck by said engine and cars and instantly killed, to his great damage in the sum of one hundred and fifty dollars; that the defendant upon approaching said crossing with its said train failed to sound its whistle, as required by law, in consequence of which the person in charge of said cows was not warned of the approach of said train until it was too late to prevent the killing of said cows; that had said whistle been sounded, as required by law, said person could have prevented said injury; that upon said occasion said train was late, and the person in charge of said cattle supposed it had already passed said crossing; that said defendant has failed to provide a safe and convenient crossing at said point, as required by law; that the approaches to said track were very abrupt, and high above the natural elevation of the surrounding land, which greatly impedes progress in crossing the same; that defendant has permitted a very high and dense growth of hedge to extend out upon its right of way and nearly up to the track on either side, which prevents persons traveling upon said road from observing the approach of trains upon its said road; that said crossing is, and long has been, so maintained by said defendant in a dangerous, inconvenient, and unsafe condition; that immediately after said cattle were killed plaintiff demanded payment therefor of said defendant; and that defendant positively refused to pay for said cattle any sum whatever; that \$50 is a reasonable attorney's fee for the prosecution of this action. Wherefore plaintiff prays judgment for the sum of two hundred dollars, and costs of suit against said defendant, and interest at 7 per cent. per annum from August 15, 1885." Upon the trial before the justice, judgment was rendered against the railroad company, from which judgment the company appealed to the district court of Harvey county. Trial had at the May term of the court for 1887, upon the original bill of particulars. The jury returned a verdict in favor of the plaintiff for \$134.80, and also made special findings of fact.

The company filed its motion for judgment upon the special findings of fact, which motion was overruled. The company also filed its motion for a new trial, which was overruled. On July 2, 1887, the court rendered judgment for \$134.80, together with costs against the railroad company. The company excepted and brings the case here.

Geo. R. Peck, A. A. Hurd and J. G. Egan for plaintiff in error.
Ady & Nicholson for defendant in error.

HORTON, C. J.—The errors alleged as grounds for reversal are—*First*. That the court erred in its instructions to the jury upon the question of the defendants allowing and permitting a hedge to grow upon its right of way, thereby obstructing the view. The instructions objected to are as follows: “*Second*. It is averred in the petition that plaintiff’s said two cows were struck and killed by one of defendant’s trains on its railroad while said cows were being driven along a public road, and at a crossing of said railroad; that the killing of said cows was caused by the negligence of the defendant and its agents and servants in permitting a hedge to stand upon its right of way, so as to prevent the approach of its said train from being seen, and by failing to sound the whistle of its locomotive, so as to give warning of the coming of its train.” “*Sixth*. The jury are instructed that if you believe from the evidence that the defendant company permitted and suffered a hedge to stand upon its right of way so as to obstruct materially the view of the track and of approaching trains by persons about to cross the railroad, on the crossing in question, and that but for such obstruction the injury in question would not have happened, then the company is liable in this case for the injury so caused, unless you further believe from the evidence that plaintiff’s own negligence contributed directly to the injury.” The court also, at the request of the railroad company, submitted certain questions of fact to the jury. The eleventh and twelfth questions and answers are as follows: “*Eleventh*. Did the person in charge of these cows take any precautions as she approached this crossing to ascertain whether any train was coming or not, prior to letting the cattle get upon the crossing? Answer. Yes. *Twelfth*. If the jury answer the last question affirmatively they may state fully what acts the person in charge of the cattle did towards ascertaining, or what steps she took to find out whether a train was coming or not. State fully. Answer. We believe that she took the same precaution that she did in always crossing—by listening and looking as far as she could. The defendant being behind time with its train, it was as much the defendant’s place to use an extra

Errors alleged.

precaution on the part of the train, being off time, to give an extra signal; furthermore, the defendant was negligent in leaving the hedge in the condition it was to prevent the seeing or hearing the approach of the train."

It is claimed that the jury in these answers required of the defendant, under the circumstances, a duty not shown by the evidence, and that by reason of that fact the motion for a new trial ought to have been granted. It seems to us that this case was decided by the jury upon the ground that the railroad company was negligent in permitting a hedge to be grown upon its right of way, so as to obstruct materially the view of its track and approaching trains, and not upon anything else. An instruction was given imputing negligence to the railroad company, on account of the hedge upon its right of way, and the jury specially found the company was negligent in leaving the hedge in the condition it was in. All the evidence shows that both the plaintiff and his daughter, who was in charge of the stock, were well acquainted with the crossing, and knew of the hedge, its height, and its condition. The hedge was from 15 to 25 feet on the right of way, and 25 to 35 from the track. If the hedge in any way prevented the person in charge of the stock from seeing or hearing the approaching train, then, of course, being well acquainted with the hedge and the premises, additional precaution should have been taken to see if any train was coming. We think the instruction concerning the hedge upon the right of way was misleading, and that the verdict was returned upon a wrong theory. If the growing of a high hedge upon a right of way near a public crossing is negligence on the part of the railroad company, as to a traveler or person upon a public highway, and thoroughly familiar with the hedge, the crossing, and adjoining premises, then, also, a high fence inclosing a railroad track would be an act of negligence on the part of the company; and permitting trees to grow upon the right of way near a public crossing would also be negligence. If the jury had based the verdict upon the failure of the railroad company to sound the whistle of its locomotive, as prescribed by the statute, the testimony concerning the hedge would not have been erroneous, nor affected prejudicially the case.

The bill of particulars expressly alleged that "if the whistle had been sounded as prescribed by law, the person in charge of the stock could have prevented the injury." Yet, under the instructions of the court, the jury were permitted to return a verdict against the company, without regard to whether the whistle sounded or not. The jury made a great many special

**Negligence—
Obstruction
of view.**

**Statutory al-
legations—Find-
ings.**

findings, but they made no finding, however, that there was any failure of the company to sound the whistle to its locomotive. In addition, the jury specially found that the person driving the stock was on horseback; therefore she might, as she approached the crossing, have ridden ahead of the stock, and ascertained if any train was coming before she started the stock across the track.

The judgment of the district court will be reversed.

VALENTINE, J., concurring. JOHNSTON, J., dissenting.

Crossings—Obstruction of View by Bushes and Trees on Right of Way—
See *International & G. N. R. Co. v. Kuehn* (Tex.), 35 Am. & Eng. R. Cas. 421; *Nehrbas v. Cent. Pac. R. Co.* (Cal.), 14 *Id.* 670.

LOUISVILLE, NEW ALBANY & CHICAGO R. Co.

v.

ETZLER.

(*Indiana Supreme Court, January 23, and May 11, 1889.*)

Private Crossings—Duty of Landowner to Maintain Gates—Liability.—If a landowner whose lands are intersected by a railroad, takes advantage of the Indiana Statutes of April 8 and 13, 1885, which authorize him to construct and maintain crossings over the railroad, and impose upon him the duty of constructing and maintaining gates thereto, the company is not, in the absence of negligence, liable for the injury or killing of cattle at such crossings.

Same—"Driveway"—Special Finding.—A special finding of facts that the animals injured entered upon the track at a point where the railroad crosses "a cartway or private way known as 'McQuiddy's Crossing.'" imports that such cartway was a "driveway" within the meaning of the Indiana acts.

APPEAL from Circuit Court, Jackson County.

Action by George J. Etzler against the Louisville, New Albany & Chicago R. Co. to recover damages for injuries to two bulls which were run over by one of defendant's trains. The defendant pleaded in defense the acts of April 8 and 13, 1885, which authorize landowners of right to construct and maintain crossings over railroad tracks, and impose upon them the duty of constructing and maintaining gates thereto. The defendant appeals from a judgment for the plaintiff.

Alsbaugh & Lawler and *G. R. Eldridge* for appellant.
Voyles & Morris for appellee.

OLDS, J.—This is an action brought by the appellee against the appellant for the value of two mules, which it is alleged in complaint, entered upon the railroad track of the appellant at a point where it was not fenced, but might have been fenced, and while upon the track were run against and over by an engine and train of cars run and operated by the employes of the appellant, and one of them killed, and the other wounded and greatly injured; that they were each of the value of \$150, to the damage of the appellee in the sum of \$250. The cause was tried by the court without the intervention of a jury. The court rendered a special finding of facts and conclusions of law upon them.

The facts found are as follows: (1) The plaintiff is a citizen of Washington county, Ind., and on the 12th day of October, 1885, was the owner of two mules described in the complaint, and that on said 12th day of October, 1885, the defendant was, and now is, a railroad company owning and managing the Louisville, New Albany & Chicago Railway, which railway runs in and through said county of Washington. (2) And on said day a train owned and run by said defendant upon said railway, and controlled by the employes and servants of said defendant, ran against and upon said mules, which had entered in and upon the track of said defendant's road, and killed one of said mules, and so injured the other as to render it worthless. (3) That said mules entered upon the track of defendant's road at a point in said county where said railroad crosses a cartway, a private way known as "McQuiddy's Crossing," and from said crossing passed east upon said track. (4) That there were no cattle guards at said crossing, or any other obstacle to prevent said mules from passing from said private way to and upon said track. (5) The railroad at the point where the mules entered runs very nearly east and west, and the mules went eastwardly after they entered upon the track. (6) That said mules, after entering upon said track, grazed along the same for some time, and then ran rapidly eastwardly, until they came to the cattle guard across said railroad at Garrot's farm, in said county, which cattle guard the mules got over, and when east of said cattle guard they were in a space inclosed by fences on each side, and a cattle guard at each end of said fences, which fences and cattle guards inclosed said railroad; that the two cattle guards on the Garrott land are between one-quarter and a half mile apart. (7) At a point 40 or 45 rods

Findings of fact.

from the west cattle guard, and on Garrott's land, a train on said defendant's road overtook, struck, and killed one of said mules, which mule was of the value of \$100. The train that struck said mule was going south. (8) That about 40 rods from the point where the first mule was struck, and at the east cattle guard, the second mule was struck by a train of defendant, and carried over the cattle guard, which mule was crippled by such collision with the train in such manner as to render it of no value; that said mule before said injury was of the value of \$150. (9) That at the west cattle guard, at Garrott's, there is a highway crossing said railroad directly west of said cattle guard; that said cattle guards were in good repair, and were connected by wing fences to the fences running on each side of said railroad between said cattle guards. (10) That on the night said mules were killed and injured, four trains, two passenger and two freight trains went south upon said railroad, and over the portions of the road where said mules were struck by the engine or cars; said passenger trains were about one-half hour apart; that said mules escaped from inclosure of the plaintiff the night they entered upon said track. (11) That said mule was killed and the other injured in Washington county, Ind., were the property of the plaintiff, and that the place where said mules entered upon the track of defendant was not, but might have been, securely fenced, and said mule was killed and the other injured by a train of cars belonging to said defendant, and running upon said defendant's road.

By the finding of facts it appears that the mules entered upon the track at a private farm crossing known as "McQuiddy's Crossing," on the 12th day of October, 1885. This was after the acts of April 8 and 13, 1885, took effect, and were in force. In the case of *Hunt v. Lake Shore & M. S. R. Co.*, 112 Ind. 69, 35 Am. & Eng. R. Cas. 176, it was held by this court that under the acts of April 8 and 13, 1885, a railroad company was not liable for injuries to stock entering upon the track at such points, in the absence of negligence on the part of the company or its employes. There is no negligence charged in this case. The court, therefore, erred in its conclusions of law. The judgment is reversed, and cause remanded, with instructions to the court below to restate the conclusions of law in accordance with this decision, and to render judgment for appellant.

Stock entering at private crossing.

A petition for rehearing was filed, and thereupon the foregoing opinion was withdrawn and a rehearing granted. The following is the opinion of the court rendered upon such rehearing:

OLDS, J.—This is an action brought by the appellee against the appellant for the value of two mules which it is alleged in the complaint entered upon the railroad track of the appellant at a point where it was not fenced, but might have been fenced, and while upon the track were run against and over by an engine and train of cars run and operated by the employes of the appellant; and one of them was killed and the other wounded and greatly injured; and that they were each of the value of \$150,—to the damage of the appellee in the sum of \$250. The cause was tried by the court without the intervention of a jury. The court made a special finding of facts and stated its conclusions of law thereon.

The special findings of facts and conclusions of law are as follows: "*First*, The plaintiff is a citizen of Washington county, Indiana, and on the 12th day of October, 1885, was the owner of two mules described in the complaint; and that on said 12th day of October, 1885, the defendant was and now is a railroad corporation, owning and managing the Louisville, New Albany & Chicago Railway; which railway runs in and through said county of Washington. *Third*. That, on said day, a train owned and run by said defendant upon said railway, and controlled by the employes and servants of said defendant, ran against and upon said mules, which had entered in and upon the track of said defendant's road, and killed one of said mules, and so injured the other as to render it worthless. *Fourth*. That said mules entered upon the track of defendant's road at a point in said county where said railroad crosses a cartway or private way known as 'McQuiddy's Crossing,' and from said crossing passed east upon said track. *Fifth*. That there was no cattle guard at said crossing, or any other obstacle, to prevent said mules from passing from said private way to and upon said railroad track. *Sixth*. The railroad, at the point where the mules entered, runs very nearly east and west; and the mules went eastwardly after they entered upon the track. *Seventh*. That said mules, after entering upon said track, grazed along the same for some time, and then ran rapidly eastwardly until they came to the cattle guard across said railroad at Garrott's farm in said county, which cattle guard the mules got over; and, when east of said cattle guard, they were in a space enclosed by fences on each side, and a cattle guard at each end of said fences, which fences and cattle guards enclosed said railroad. That the two cattle guards on the Garrott land are between one-quarter and a half mile apart. *Eighth*. At a point 40 or 45 rods from the west cattle guard on Garrott's land, a train on said defendant's road

overtook, struck, and killed one of said mules, which mule was of the value of one hundred and twenty dollars. The train that struck said mule was going south. *Ninth.* That about forty rods from the point where the first mule was struck, and at the east cattle guard, the second mule was struck by a train of defendant and carried over the cattle guard, which mule was crippled by such collision with the train in such manner as to render it of no value. That said mule before said injury was of the value of \$130. *Tenth.* That, at the west cattle guard at Garrott's, there is a highway crossing said railroad directly west of said cattle guard. That said cattle guards were in good repair, and were connected by wing fences to the fences running on each side of said railroad between said cattle guards. *Eleventh.* That, on the night said mules were killed and injured, four trains—two passenger and two freight trains—went south upon said railroad and over the portion of the road where said mules were struck by the engine or cars. Said passenger trains were about one-half hour apart. That said mules escaped from inclosure of the plaintiff the night they entered upon said track. *Twelfth.* That said mule was killed and the other injured in Washington county, Indiana; were the property of the plaintiff; and that the place where said mules entered upon the track of defendant was not, but might have been, securely fenced; and said mule was killed and the other injured by a train of cars belonging to said defendant, and running upon said defendant's road. (Court's conclusion of law.) And, as a conclusion of law, the court states, upon the facts so found, that said plaintiff is entitled to recover the sum of two hundred and fifty dollars."

The appellant excepts to the conclusions of law, and assigns as error that the court erred in its conclusions of law. By the act of the legislature, approved April 8, 1885, persons owning tracts of land separated by the right of way of a railroad company are authorized to construct and maintain wagon and drive-ways across such right of way of said company; and, by said act, railroad companies are exempted from liability for damages for animals killed or injured on the track of such railroad, by the cars or locomotives running on such railroad, if such animals entered the track of such railroad at such private roadway,—unless it shall be proven that such killing or injury was caused by the negligence of the servants of the company owning or operating such railroad. True, the language of the act is, "if such animal entered upon the track of such railroad through such gates," and the act provides that the landowner shall erect and maintain substantial

Statutory authority to construct private crossing.

gates and keep them securely locked when not in use, but the erection of the gates and keeping them locked is an obligation imposed on the landowner, and for the violation of which he is liable. The absolute right to construct and maintain a private crossing is given to the land owner; and the right of the railroad company to have exclusive control of their right of way and fences is diminished and taken away to that extent; and, having no control over their right of way to prevent or control the construction and use of farm crossings, they are exempt by such act from liability for damages for animals killed or injured, if they enter upon the railroad through such private crossings, whether there are any gates erected through which the animals pass or not, unless the killing or injury is caused by the negligence of the servants of the company. These crossings are authorized to be constructed along the line of the railroad where the track may be securely fenced; and it constitutes an exception to the liability of a railroad company for stock killed upon the track when such stock entered upon the track when it was not securely fenced, and where it might have been so fenced. Of course, if there was negligence on the part of the railroad company, or its employes, in not properly keeping in good repair any portion of the fence it was the duty of the company to keep in repair, and by reason of such neglect the animals entered upon the track through or across such defective fences, the company would be liable. We have said this much on the question of the statute for the reason that it is contended by counsel for appellee that, unless it affirmatively appears that the animals entered upon the track through gates at the private crossing, the company is liable; and it is contended that it does not so appear by the special finding in this case, and that the special findings in this case do not show an entry of the animals through such a crossing as is contemplated by the statute of 1885.

It appears from the special finding of facts in this case that the mules entered upon the track at a point where the railroad crosses "a cartway or private way known as 'McQuiddy's Crossing.'" The construction we place upon this finding is that it was a private farm crossing, such as is authorized by the statute, where the mules entered upon the track. No other crossings are permitted by law, except public streets and highways. The crossing is not designated in the finding by the same term used in the statute. The statute uses the words "wagon and driveways." A "private way or cartway" means, as we think, a "driveway;" and the special findings do not show that the servants of the company were guilty of

Private crossings—Construction of finding.

any negligence which caused or contributed to the killing of the mules. *Hunt v. Lake Shore & M. S. R. Co.*, 112 Ind. 69, 35 Am. & Eng. R. Cas. 176. We are therefore of the opinion that the facts found by the court did not entitle the appellee to recover; and we might add, further, that, independently of the question of the mules entering upon the track at a private crossing, that the facts found show that after the mules entered upon the track they, of their own volition, strayed along the track until they came upon a public highway where the railroad company were not required to fence their track; and from such highway the mules, without being driven by approaching locomotive or cars, or by reason of any fault on the part of the railroad company or its employes, of their own accord entered upon the track where it was properly and securely fenced, crossing over a proper cattle guard, which was at the time in good condition; and, to say the least, these facts render the appellee's right to recover very doubtful; but, having to reverse the judgment on the other question, it is not necessary to pass upon this. The only exceptions reserved and error assigned were to the conclusions of law stated by the court; and it would seem that the statute exempting the appellant from liability was not considered in the trial of the cause; and for that reason the facts may not have been so fully stated by the court as they would have been had the court at the time had in mind the statute; and the findings of fact may convey a different idea to this court than was intended by the court trying the cause. We are of the opinion that justice will be best subserved to order a new trial in this cause. *Buchanan v. Milligan*, 108 Ind. 433. The judgment is therefore reversed, at the costs of appellee, with instructions to the court below to set aside the judgment and grant a new trial; and for further proceedings not inconsistent with this opinion.

Liability of Company for Cattle Killed at Private Crossing.—See *Atchison, T. & S. F. R. Co. v. Griffis* (Kan.), 13 Am. & Eng. R. Cas. 532; *Evansville & T. H. R. Co. v. Mosier* (Ind.), 22 *Id.* 569, note 570; *Hunt v. Lake Shore & M. S. R. Co.* (Ind.), 35 *Id.* 176.

PORT ROYAL & WESTERN CAROLINA R. CO.

v.

PHINIZY.

(Georgia Supreme Court, April 29, 1889.)

Stock-Killing—Statutory Signals When Approaching Crossing.—That section 708, of the Code relative to blow posts and signals when approaching public crossings, may be submitted to the jury when stock is killed at some distance beyond a public crossing, was decided in *Western & A. R. Co. v. Jones*, 65 Ga. 631, 8 Am. & Eng. R. Cas. 267. The like rule applies where stock is killed between the blow post and the crossing, and sections 708 and 710 are to be construed together.

Same—Blowing Stock-alarm in City.—It is not negligence, affirmative or negative, for a locomotive engineer to blow the stock-alarm whistle in a town or city, to frighten an animal from the track in case of a sudden emergency, more especially where the scene of the occurrence, though within the corporate limits, is not in a populous quarter, but in the woods or fields adjacent to the city proper.

ERROR from City Court, Richmond County.

J. Ganahl for plaintiff in error.

Wm. K. Miller and *J. H. Phinizy* for defendant in error.

BLECKLEY, C. J.—A mule was killed by the railway company within the corporate limits of Augusta, but some three miles distant from the central portion of the city.

Facts.

The scene of the occurrence was upon territory added by a late amendment to the city charter. The animal was killed upon a trestle, between the blow-post and a public crossing, probably 150 yards from the crossing.

1. It is objected that the court gave in charge to the jury sections 708 and 710 of the Code. According to the principle ruled in *Western & A. R. Co. v. Jones*, 65 Ga.

Statutory signals.

631, 8 Am. & Eng. R. Cas. 267, there was no error in this part of the charge. The two sections are to be taken together. If they are pertinent when stock are beyond the crossing, we can see no reason why they are not so when the stock is on the hither side of the crossing. The sections, and the conduct of the company's employes under them, are simply for consideration by the jury. Their importance is nothing like the same when the injury occurs at a

distance from the public crossing, as when it occurs upon the crossing. Still, they have some relevancy in either case.

2. But we think the court erred in deciding as matter of law that it was negligent to blow the stock-alarm whistle. Section 710, as modified by the act of 1875, contains no express inhibition upon blowing the whistle within the corporate limits of a town or city. Ringing the bell is substituted for whistling as to all matters of notice or warning in approaching public crossings; but in this instance the blowing of the stock-alarm had no relation to the crossing, but was aimed alone at the mule, and was prompted by the emergency. We can see no reason why, in case of a sudden emergency, the whistle may not be sounded, even in the very centre of a town or city, when such a measure is requisite to save the life of man or beast, and we are sure that the statute never contemplated any inhibition upon such use of the whistle where danger occurs in the woods or fields adjacent to the populated quarters of a city. The merits of the present case, on the facts in evidence, are so close that we think the erroneous charge to the jury may have done mischief, and therefore that a new trial should be granted. Judgment reversed.

*Negligence—
Blowing
whistle in
city.*

Stock-killing—Failure to Sound Whistle—Special Finding.—In an action to recover the value of a cow killed upon a highway crossing, the special verdict found that plaintiff's cow without his fault, broke through his pasture fence in the night time; that the fence was a safe one and plaintiff made diligent search, but was unable by reason of the darkness of the night to find him; that during the same night he entered upon defendant's track at a point where the same crossed a public highway, and while the cow was upon said crossing, the defendant's train passed at a high rate of speed without sounding any whistle before reaching the crossing, and the locomotive ran over the cow and killed him. *Held*, that as there was no finding that the train was running at an unlawful rate of speed or that the employes had any knowledge of the cow being upon the crossing, the fast rate of speed of the train constituted no negligence, and that as the verdict failed to find that the death of the cow was caused by reason of the fact that the whistle was not sounded, such fact must be presumed in favor of the company, and that there could be no recovery under Ind. Rev. Stat., § 421, which confers a right of action upon any person whose property is injured by the neglect or failure of the engineer to give the statutory signals Louisville, N. A. & C. R. Co. v. Green, Ind. Sup. Ct., Oct. 17, 1889. The court said:

"We pass the sixth and seventh assignments of error, and next consider the eighth assignment of error, which presents the question as to the sufficiency of the verdict. Before the rendition of the judgment on the verdict in favor of the appellee, the appellant moved the court for judgment in its favor on the special verdict as to the cow killed on the highway crossing, and the court overruled the motion. This was a proper motion. The two causes of action were clearly distinct; and if the facts found in the special verdict entitled the appellee to a judgment in its favor upon the one cause of action, the motion should have been sustained. *Johnson v. Culver*, 116

Ind. 278. The facts found in the special verdict relating to the cow killed upon the highway crossing, we think, may be stated as follows: That plaintiff's cow, without his fault, broke through his pasture fence in the night-time; that the fence was a safe one, and plaintiff made diligent search, and was unable, by reason of the darkness of the night, to find her; and during the same night she entered upon the defendant's track, at a point where the same crossed a public highway, and, while the cow was upon the said crossing, defendant's train passed said crossing at a high rate of speed, without sounding any whistle before reaching said crossing, and the locomotive ran over said cow and killed her. These constitute the material facts found. There are some epithets and some conclusions stated in the verdict, but they must be excluded, in determining the sufficiency of the verdict. It is also stated that the defendant made no attempt to frighten said cow from said crossing, but there is no finding of facts that the employees running the train saw the cow, or knew she was upon the crossing; and if they did not see her, or know she was upon this crossing, they were not required to make any attempt to frighten her off the track. It is very doubtful whether the appellant has a right to recover for this cow in any event, in view of the fact that the cow was at large upon the highway, the plaintiff being required to keep his cattle upon his own land; and the question is presented as to whether or not the cow was not trespassing, even if she escaped without appellant's fault, and, if so, whether there can be a recovery, even if appellee's negligence caused the injury; but in view of the theory we take of the question presented by the motion, we deem it unnecessary to decide whether this would defeat a recovery or not. The appellee seeks to recover in this case by reason of the omission of the engineer and persons in charge of the train to comply with the requirements of the statute in sounding the whistle before crossing the highway. Section 4020, Rev. St. 1881, makes it the duty of engineers running engines upon railroads, upon approaching a highway crossing, to sound the whistle three times at a distance of not more than 100, and not less than 80, rods from such crossing, and to continuously ring the bell from that time until such engine has passed such crossing. Thus the engineer is required to sound the whistle distinctly three times between 80 and 100 rods from the highway crossing, and continuously ring the bell from a distance of 80 rods before reaching the crossing until his engine has passed over the crossing. Section 4021 makes the engineer liable to the state for failure to comply with the provisions of section 4020. It also provides that "the company in whose employ such engineer or person may be, as well as the person himself, shall be liable in damages to any person, or his representatives, who may be injured in property or person, or to any corporation that may be injured in property, by the neglect or failure of such engineer or other person, as aforesaid." There is no fact found in the verdict to show that the employees had any knowledge of the cow being upon the crossing; and the fast rate of speed, of itself, constituted no negligence. It does not appear that the train was running at any unlawful rate of speed; and the only negligence, if any, with which the employees of the appellee are chargeable, is omitting to sound the whistle; and unless, from the facts found, the conclusion can be drawn that the death of the cow was caused by reason of the fact that the whistle was not sounded, there can be no recovery, for the statute expressly provides that the liability is for property injured by reason of the failure to sound the whistle and ring the bell. It is the well-settled rule that, if the finding or verdict is silent upon a material point, on that point it is against the party having the burden. *Dennis v. Louisville, N. & C. R. Co.*, 116 Ind. 42, 35 Am. & Eng. R. Cas. 141.

"In the absence of a finding of a fact to the contrary, the presumption is that the engineer in charge of the train discharged his duties, and sounded

the whistle and rung the bell as the statute required. The jury found as a fact that he did not sound the whistle, but the verdict is silent as to whether or not he rung the bell; and, being silent as to that fact, we are to pass upon the question as if that fact was found in the verdict in the affirmative, with this omitted fact supplied as the law supplies it. The question presented is whether we can draw the conclusion that the death of the cow killed upon the highway crossing was caused by the neglect of the engineer to sound the whistle. In order to entitle the appellee to judgment for the value of this cow, the inference must be drawn that the cow remained on the track notwithstanding the noise of the approaching train, the ringing of the bell, and shining head-light of the engine, coming at a rapid rate of speed towards her, but, if the whistle had been sounded, she would have left the track, and avoided instant death. We do not think this conclusion can be drawn from the facts found in the special verdict. The primary object of the statute is to add to the safety of human life, and to surround it with an additional safeguard, by requiring a signal to be given to persons in the vicinity of highway crossings, warning them of the approaching train, that they may heed the warning and avoid danger. It is, manifestly, not the ordinary object or purpose of the statute to require this signal for the purpose of frightening animals which may chance to stray upon the crossing, as the law does not permit cattle to run at large in the highways of the state; and the presumption is that none will be upon the highway, and, if they were, would no doubt be as liable to become frightened at the approaching train as by the signals required; while, upon the contrary, persons with vehicles and driving animals are rightfully upon the highway, and it is to be presumed, if a signal is given, they will avoid danger. The court erred in overruling appellee's motion for judgment in its favor for the cow killed on the highway crossing."

Same—Company's Rules—Rate of Speed.—By the rules of the company, trains were prohibited from passing stations at a greater speed than 15 miles an hour. Another rule required the watchman employed at the station to signal the engineer whether or not the track was unobstructed when the train was approaching the station. The watchman gave the signal that the track was unobstructed, and the engineer ran the train past the station at the rate of 30 miles an hour. It was a clear moonlight night and the watchman testified that the track was unobstructed so far as he could see. In point of fact, a number of plaintiff's sheep had strayed upon the track and were upon it at a distance of about 150 rods from the depot. There was no testimony tending to show that the sheep could be seen from the depot. *Held*, that the company's rules were designed for the protection of passengers and of persons and property more liable to be exposed to dangers at depots than elsewhere, and that the company was not negligent as the rate of speed was not unusual for express passenger trains. *Stern v. Michigan Cent. R. Co.*, Mich. Sup. Ct., Oct. 18, 1889.

Same—Regulation as to Speed—Instructions.—In an action for negligently killing certain mules belonging to the plaintiff, the plaintiff proved the killing by defendant's train and thus established a *prima facie* case of negligence. The company relied on the fact that the train was running at the rate of 18 miles an hour under one of its regulations as a defense. The court instructed the jury that "if the rule was not reasonable or if it was not being carried out in the same way that a reasonable and prudent man would have taken the train in order to prevent an accident, then you ought to find a verdict for the plaintiff." *Held*, that the defendant could not object to the instruction given, it being more favorable to him than to the plaintiff, because the charge substantially meant, that in so far as the regulation would have effect, it would depend upon the fact whether it was a reasonable one and whether it had been carried out as reasonable and pru-

dent persons could carry it out. McIVER Jr., dissenting. Molair v. Port Royal & A. R. Co., S. Car. Sup. Ct., Nov. 15, 1889. SIMPSON, C. J., who delivered the opinion of the court said :

" It appears, or at least it seems to have been contended on the part of the defendant, that the train was running at the rate of 18 miles an hour under regulation of the company, and this was relied on in part as a defense ; and it is alleged that his honor charged that whether this would be a good defense would depend upon the fact whether this was a reasonable regulation or not, and that if it was not reasonable the verdict should be for the plaintiff, although the jury might believe that neither the regulation nor the operation thereof was the cause of the injury complained of. Upon reading the charge as a whole, we do not think it is subject to the construction put upon it by appellant, as presented in these exceptions. It must be remembered that, plaintiff having proved the killing, a presumption of negligence attached at once, which it was incumbent on the defendant to remove. In other words, the plaintiff having made out a *prima facie* case of negligence under Danner's Case, 4 Rich. Law, 330, and the cases subsequent to that case, he was entitled to a verdict, unless this *prima facie* negligence had been overthrown. It was to this state of facts that the portion of the charge objected to was addressed, and his honor did not charge, even in general terms, that if the regulation of the company was unreasonable, or if it was not carried out, the company would be liable, even though the jury might not be satisfied that this caused the injury. But, a *prima facie* case of negligence having already been made out, the question was upon its removal ; and his honor charged, or at least such is the true intent of the charge, as we understand it, that in so far as said regulation would have effect it would depend upon the fact whether said regulation was a reasonable one, and whether it had been carried out as reasonable and prudent persons should carry it out. Thus understood, and we think this is what his honor meant, the plaintiff had greater cause of complaint than the defendant, for the reason that the charge, when thus understood, limited the matter of negligence to the question whether the regulation of the company was reasonable or unreasonable, and whether, if reasonable, it had been prudently carried out ; whereas the plaintiff had made out a *prima facie* case of negligence, not based solely on the fact that the regulations of the company were unreasonable, or, if reasonable, that they had not been properly carried out, or that the failure to observe the regulations, whether reasonable or unreasonable, was the cause of the injury, but based upon negligence presumed by law from the killing. This negligence in such cases might result from various causes. His honor's charge, however excluded them all, except the reasonableness or unreasonableness of the rule of the company as to the speed of the train, and, if reasonable, whether it had been prudently carried out. We do not understand that his honor instructed the jury that if, in their opinion, the regulation was unreasonable, or, if reasonable, and not prudently carried out, that they could assume that to be the negligent cause of the injury. But he meant that negligence having already been presumptively proved, whether the regulation could overthrow this presumption would depend upon whether such regulation was reasonable, and, if so, whether it had been prudently expressed. If the negligence relied on by the plaintiff had been based entirely upon faulty regulations of the company, or upon a failure to enforce prudently reasonable regulations, then his honor's charge would have been fair to both sides ; but when the plaintiff relied on negligence in the killing, growing out of any and all causes that could show negligence, we do not think the defendant has cause to complain that his honor should have limited the question as he did. His honor went further, and charged that if the regulation was a reasonable one, and was being carried out in the

same way as a reasonable and prudent man would have taken the train in order to prevent an accident, then the verdict should be for the defendant. Certainly the defendant could not complain of this, nor, do we think, of the converse of this, to-wit, if the rule was not reasonable, or if it was not carried out as a prudent man should have carried it out, then the verdict should be for the plaintiff. Thus, giving the defendant the advantage of having the whole case to turn upon the rule, and whether it had been prudently enforced, we do not think the charge is obnoxious to the fifth exception, as will be seen from what has been said above.

STACEY

v.

WINONA & ST. PETER R. CO.

(*Minnesota Supreme Court, December 9, 1889.*)

Stock-killing—Cattle-guards—Duty of Company to Remove Snow and Ice.—Applying the rule in regard to the removal of snow and ice from cattle-guards, laid down in *Blais v. Minneapolis & St. L. R. Co.*, 34 Minn. 57, 22 Am. & Eng. R. Cas. 571, to the undisputed facts in this case, it is held that the trial court erred in refusing to charge the jury, as requested, that the defendant was not negligent in this respect as to a guard over which plaintiff's cattle passed onto its railway track.

Same—Trespassing Cattle—Lookout.—The cattle were running at large in violation of the law. *Held*, that as the cattle-guard was not in an unlawful or forbidden condition, under the circumstances, and as the cattle were at large contrary to law, trespassers upon defendant's right of way, the defendant's servants, engaged in operating its trains, were not bound to anticipate such trespassing by looking ahead, or by managing a train with reference to such a contingency.

APPEAL from District Court, Goodhue County.

Action by Edgar Stacey against the Winona & St. Peter Railroad Company to recover damages for injuries to stock. The jury returned a verdict for the plaintiff, and judgment was entered thereon. The defendant appeals from an order denying a new trial.

Wilson & Bowers for appellant.

J. C. English and *J. C. McClure* for respondent.

COLLINS, J.—In *Blais v. Minneapolis & St. L. R. Co.*, 34 Minn. 57, 22 Am. & Eng. R. Cas. 571, this court announced that, save under exceptional and extraordinary circumstances, reasonable care and diligence did not require a railway company to remove the natural accumulations of snow and ice from its cattle-guards; and such rule must be accepted as the settled law of the state upon the subject. That case was carefully considered, as is manifest from the opinion, in which the reasons for the conclusion are clearly and forcibly stated, and we remain satisfied that it was decided correctly. No special circumstances were shown to exist in the case at bar which should except it from an application of the established law. It was undisputed that the winter had been the most severe for eight years. Snow had fallen to a great depth; in many places entirely covering the fences along defendant's right of way. Cattle could make their way almost anywhere, the fences proving of little or no use. Defendant's railway had been blockaded several times during the season, and only a few days prior to the accident had been closed for nearly one week on account of the snow. A large number of men, with engines and snow-plow, were engaged constantly in removing the drifting snow from the rails; and so much had been thrown out that it was piled up on either side of the track until there was barely room for the trains to pass by. There were at least ten cattle-guards upon the repair section in question, six and three-fourths of a mile in length. It is true that plaintiff's farm bordered on the corporate limits of a village; but we are not informed of its size, and there is nothing in the case tending to indicate that the road from which the animals went upon defendant's track was anything more than an ordinary country highway. With these circumstances before it, the trial court erred in directing the jury to pass upon the question of defendant's negligence in regard to keeping the ground free and clear of snow and ice, and whether or not it had used reasonable precautions in the matter. Under the rule established by the *Blais* case, defendant was not negligent in this respect. The court should have so charged the jury as requested by the defendant; for it is apparent that the conditions were such at the time of the accident, and for some weeks previous, as to relieve it from attempting to keep the cattle-guard free and clear of snow and ice. A duty of this magnitude no more devolved upon the defendant than that, equally as important, of removing the snow from such portions of the fence along its right of way as happened to be covered up, and thus rendered of no value.

As a new trial must follow, it is proper that we should con-

Obligation to
remove snow
and ice from
cattle-guard.

sider some other features of the case. Plaintiff's cattle were usually kept in his barn-yard, a few rods north of the railway crossing. On the day in question they had been permitted to go from the yard into an old and unfenced cornfield, from which they wandered to the highway, and thence—at the crossing—upon defendant's track, along which they proceeded until overtaken by its locomotive. The common law in reference to the restraint of domestic animals prevailing in this state, in the absence of proof that the electors of a municipality have adopted a by-law to the contrary, made it plaintiff's duty to keep his stock upon his own premises, and not permit it to run at large. This duty he disregarded at a time, perhaps, when he should have been very vigilant, in view of the weather and condition of the railway in his immediate vicinity. The cattle were allowed to wander from an inclosure. They were unlawfully on the public road, and thereafter became trespassers upon defendant's railway.

Obligation of owner to keep cattle within bounds.

Bearing in mind that at this time the defendant was not in default in its duty as to cattle-guards at its crossings, the case must be considered precisely as if the statute had never existed, or precisely as if defendant was not required to fence its right of way, and the cattle had strayed thereon from adjacent lands, and been injured. It must be determined upon common law principles, and, as to trespassing cattle, the defendant would only be liable for actual negligence on the part of the engineer, for his neglect to exercise reasonable and proper care, for his failure to use due diligence to avoid injury to the cattle after discovering them upon the track. The defendant's servants could rightfully act upon the presumption that plaintiff's stock was upon his premises, and were not bound to anticipate trespassers by looking ahead, or by managing its trains with reference to such a contingency. *Locke v. First Div. St. Paul & P. R. Co.*, 15 Minn. 350 (Gil. 283); *Witherell v. Milwaukee & St. P. R. Co.* 24 Minn. 410; *Hooper v. Chicago, St. P., M. & O. R. Co.*, 37 Minn. 52; *Palmer v. Northern Pac. R. Co.*, 37 Minn. 223, 31 Am. & Eng. R. Cas. 544.

But it has been said that the road should have been operated with reference to the fact that the guard was of no value as an obstruction to the passage of animals from the road to the right of way. This claim is answered by saying that plaintiff's cattle were upon the railway track in violation of the law, while the guard was not in a forbidden or unlawful condition. It was in a condition which is recognized as unavoidable in severe winters, and for which railway companies are not responsible, unless there be exceptional and extraordinary cir-

cumstances. The court therefore erred in refusing defendant's fourth request, which was, in effect, that defendant's servants were under no obligation to look ahead for trespassing cattle.

We are unable to discover from the testimony that any duty rested upon the defendant to remove from such part of plaintiff's path or approach to the crossing as was within the limits of the public road the snow thrown there by men and plows engaged in clearing out the railway, and for that reason defendant's ninth request should have been given to the jury. The plaintiff's right to recover, upon the testimony now before us, turned, therefore, upon the question of the failure and neglect of defendant's engineer to exercise due care and diligence to avoid injury to the cattle after he discovered them upon the track. Order reversed.

Cattle-Guards—Duty of Company to Remove Snow and Ice.—In *Blais v. Minneapolis & St. L. E. Co.*, (Minn.) 22 Am. & Eng. R. Cas. 571, it was held that reasonable care and diligence do not require a railroad company, unless under exceptional and extraordinary circumstances, to remove the natural accumulations of ice and snow from the cattle guards; but in *Dunnigan v. Chicago & N. W. R. Co.*, 18 Wis. 33, the court held that where a railroad company permits its cattle guards to remain filled with snow so that cattle which have got upon the highway without any negligence on the part of the owner, pass over the guards and are in consequence injured, the company is liable for the damages.

In *Hance v. Cayuga & S. R. Co.*, 26 N. Y. 428, a railroad company which had complied with the statutory provision relative to fences and cattle guards, negligently omitted to remove snow from the cattle guard, and in consequence plaintiff's cow went from the highway on to the track and was killed. It was held that as plaintiff was guilty of negligence in allowing the cow to escape, the company was not liable even though it had been guilty of negligence in permitting the snow to remain in the cattle guard.

In *Wait v. Bennington & R. R. Co.*, (Vt.) 17 Atl. Rep. 284, the court held that the test of the company's liability was not whether the cattle guards were clear of snow and ice, but whether in their maintenance the company was negligent, and that this must be determined by the jury under all the circumstances of the case, —*e. g.*, the location of the road, the number of animals which may reasonably be apprehended to be at large, the prevailing storms, the nature and character of the weather, and all other facts bearing upon the question.

CINCINNATI, WASHINGTON & BALTIMORE R. Co.

v.

HOFFHINES.

(Ohio Supreme Court, December 10, 1889.)

Stock-killing—Fences—Compensation for Expense of Fencing.—Where, in an action for damages to stock, brought against a railroad company on the ground of negligence in failing to maintain a fence between the company's right of way and the land of the plaintiff, the defense interposed is that, in the condemnation proceeding by which the company's right of way was acquired, the expense of fencing was taken into account by the jury, and included in the verdict, and the company, to sustain such defense, gives in evidence the record of the proceeding, and the record is silent on the subject, no presumption arises that the matter of building and maintaining fences along the line of the railroad was considered, and compensation to the owner therefor awarded in the verdict.

Incorporation—Change of Name—Judicial Notice of Commissioner's Report.—The question whether the terms of a statute, authorizing a change of name on the part of a railroad company upon the making of certain subscriptions authorized by the same act, has been complied with or not, is, where pertinent, a proper subject of allegation and proof; and courts will not take judicial notice of a statement in a report of the commissioner of railroads to the effect that the terms of the statute have been complied with, and the name of the company changed.

ERROR to Circuit Court, Vinton County.

Action was brought by Voss Hoffhines against the Cincinnati, Washington & Baltimore Railroad Company in the court of common pleas of Vinton county to recover for the killing of two horses by a train of cars, July 24, 1885, on the line of the company's road. The alleged negligence consisted in the neglect of the company to fence its road through the lands of the plaintiff, whereby the horses got upon the track. The main defense interposed was, "that in 1853, the Marietta & Cincinnati Railroad Company was a corporation, created and existing under the laws of the state of Ohio, and authorized to construct and maintain the railroad named in the plaintiff's petition, and also to enter upon any land, survey, lay down, and construct said road, and to take any materials necessary to the construction and repair of the same, and to appropriate the lands and materials necessary for that purpose, according

to the statute in such case made and provided, and, upon such appropriation being made, to retain, own, hold, and possess said materials, and to use and occupy said lands, and to hold the same for the purposes for which the same were appropriated, first paying or depositing, as required by law, the amount awarded by the jury in such appropriation proceedings, as compensation and damages to the land-owner by reason of such appropriation. That in pursuance of such authority the said company, having located its road through the inclosed lands and fields of Voss Hoffhines and William Hoffhines, and desiring to appropriate a right of way therefor through and upon said inclosed lands and fields of said Hoffhines, and not being able to agree with him, or with any authorized agent of his, as to the amount of compensation to be paid therefor, instituted on said — day of —, A. D. 1853, certain proceedings in the court of probate of said Vinton county for the condemnation of said right of way, according to the statute in such case made and provided, and in such proceedings there was condemned and appropriated to the use of the said Marietta & Cincinnati Railroad Company, for the purposes aforesaid, out of said inclosed lands and fields, a certain strip or parcel of land seventy feet wide on each side of, and along, the center line of the railroad of the said company as the same was then and now located through the lands of said Hoffhines, and fifty feet wide on each side through the lands of said William Hoffhines; the said rights of way through the lands of Voss Hoffhines, so appropriated, being the rights of way at the place where the plaintiff claims by his petition a fence should have been erected and maintained by the defendant, and for lack of which he claims his horses got upon defendant's track and were killed. That in the proceedings aforesaid the said Voss Hoffhines and William Hoffhines, by their attorney, severally claimed additional compensation or damages for said right of way on account of building and keeping up a fence along and upon either side of said railroad track of said railroad company through their premises; and that witnesses were introduced by and on behalf of said Voss and William Hoffhines to prove the cost of building and keeping up said fences, and compensation and damages were accordingly assessed therefor. And the jury, by their verdict, assessed the compensation and damages of said Voss Hoffhines, including building and maintaining fences aforesaid, at four hundred and ninety-eight dollars, and of said William Hoffhines at seven hundred and seventy-six dollars. That thereupon said company paid the amount of said verdicts, and the cost of said proceedings, and the court rendered a judgment therein to the effect that the said company

should hold the said property for the said purposes for which the same was appropriated, and the said company thereupon took possession of said land, and held the same for the uses and purposes aforesaid, until the year 1860, when the entire railroad of said company, including said right of way so appropriated at, and along the place aforesaid, and of which the place named in the plaintiff's petition, where the alleged failure of defendant to fence took place, was and is a part, became and was vested in the Marietta & Cincinnati Railroad Company, as reorganized, and was thereafter owned by said reorganized company, until said entire railroad, together with said right of way, and all franchises and property whatever of said reorganized company, were purchased by, and by assignment and conveyance became vested in, the defendant, the Cincinnati, Washington & Baltimore Railroad Company, in July, A. D. 1884, and was so owned by it at the time alleged in plaintiff's petition, and has been ever since so owned." Reply was filed admitting that there was a condemnation proceeding at the time stated; admitting that the award of the jury was paid, and possession taken by the company; and denying all other allegations. At the trial the defendant requested the court to give in charge to the jury the following proposition, viz: "That at this lapse of time the presumption is that in the condemnation proceedings compensation was considered and awarded for the building and maintaining of fences along the railroad." The court refused to so charge, to which the defendant excepted, and this is the alleged error here complained of. Verdict was given for the plaintiff, and judgment rendered upon it. Error was prosecuted by the company to the circuit court, where the judgment below was affirmed. To reverse these judgments this proceeding here is prosecuted.

W. T. McClintick and *E. W. Strong* for plaintiff in error.
Rannells & Derby for defendant in error.

SPEAR, J.—The question is: Did the trial court err in refusing the request to charge? It is insisted by the plaintiff in error that at the time of the trial of the condemnation proceedings there was no obligation on its part to fence its line of road because the charter of its predecessor, the Marietta & Cincinnati Railroad Company, obtained prior to the enactment of any law requiring railroad companies to fence, imposed no such burden upon it; that the organization of that company was anterior to the passage of the general incorporation act of May 1, 1852, and the company was not affected by the provisions of that act; and inasmuch as the building and main-

Obligation of
 defendant to
 fence road.

taining of a fence between the company's right of way and the lands of the adjoining owner was, under the constitutional requirement that "compensation therefor shall first be made," an element of damage proper to be taken into account by the jury in awarding compensation and damages to the land-owner, it necessarily follows, as a conclusive presumption, that that matter was taken into account by the jury, and compensation therefor awarded in the verdict. In other words, the question of the duty of the railroad company to fence at the time of the accident is *res adjudicata*; and having, by satisfying the verdict, paid the land-owner for making and keeping up a fence, the negligence which caused the accident was that of the plaintiff, and the company cannot be held for the consequent damages. For the purposes of this branch of the inquiry, it may be assumed, without holding, that the Marietta & Cincinnati Company was not organized under the act of May 1, 1852, entitled "An act to provide for the creation and regulation of incorporated companies in the state of Ohio," which makes it the duty of every company organized under it to fence its road with a good substantial wooden fence, and therefore, at the time of the appropriation, not affected by the provision above referred to. The question then is, does the record of that proceeding furnish a conclusive presumption that the expense of fencing was included in the verdict?

The substance of the company's petition was that it was necessary, on behalf of the company, to appropriate the lands described for the use and right of way of the company in the construction of its railroad, and that the company had been unable to agree with the owner upon the compensation to be paid for the appropriation by and to its use. The prayer was that the lands "may be duly appropriated for the use and purpose aforesaid, and that such proceedings may be had in the premises as may be necessary to perfect the same according to the statute in such case made and provided." No answer or other pleading was required, and none was filed, and the subject of fencing is nowhere mentioned in the record. The verdict was for a gross sum as damages by reason of the appropriation.

If it may be inferred from the record that the matter of damages by reason of a necessity on the part of the land-owners to construct and maintain a fence between his land and that of the company was necessarily determined in the proceeding; or if the matter of fence, as an element of damage, was necessarily involved in the proceeding, as shown by the record—then the contention of the plaintiff in error is correct. No duty would devolve upon the company, by reason

Payment of
compensation
—Record of
condemnation
proceedings.

of the statute, to maintain a fence, and the court erred in refusing the instruction asked. But, if the question of fencing might not have been involved in the case, then, the record being silent on that subject, no such presumption would arise. On the contrary, the duty to fence enjoined by the statute of March 25, 1859, (now section 3324, Rev. St.), which provides that every railroad company having the control of a railroad operated in this state, within two years after the passage of the act, or after commencing to run cars, shall construct and maintain fences on both sides of its road, would be imposed upon the company, and the instruction was properly refused. "The question is not what the court might have decided in the former action between the parties, but what the court did in fact decide as shown by the record. * * * A judgment is conclusive by way of estoppel only as to facts, without the proof or admission of which it could not have been rendered." *Porter v. Wagner*, 36 Ohio St. 471.

To sustain the company's contention, reliance must be had on the record of the condemnation proceeding alone. That record does not disclose the character of the land sought to be appropriated. We do not overlook the fact that in this case the company alleges that, having located its road through the inclosed lands and fields of the plaintiff, and desiring to appropriate the same, and not being able to agree with the owner, it instituted the appropriation proceeding, etc. But this allegation cannot help out the record of that proceeding. The learned counsel, in their brief, insist that evidence at the trial "could not be allowed to contradict, or explain, or do away with, the legal effect of the condemnation proceedings." Whether, in this broad language, the proposition can be maintained or not, we need not stop to discuss. Certain it is that the record itself could not be thus enlarged, and it is the claimed conclusive effect of that record we are here considering. So that, unless it can be satisfactorily shown that the question of fencing was necessarily and always involved in all appropriation inquiries prior to the enactment of the statute requiring railroad companies to fence, it cannot be conclusively presumed to have been involved in this one. No attempt has been made to show this, and we think it cannot be shown. In the construction of railroads there are many places where fences are wholly impracticable. The contour of the land may be such as to make fencing impossible, or the existence of permanent buildings just on the line may render a fence wholly unnecessary. This seems too obvious to need elaboration. It follows, as we think, that the record of the condemnation proceedings did not raise a conclusive presumption that the expense of maintaining a fence was, or might

have been, taken into account by the jury in making up the verdict, and that the trial court committed no error in refusing the instruction asked.

Another question arises in the case: It was vital to the company's defense to show that neither the act of May 1, 1852, nor the act of March 25, 1859, applied to the Marietta & Cincinnati Railroad Company. Every railroad organized under the former act came within its requirement as to fencing, and presumably all railroad companies are brought within the provisions of the latter act. The burden, therefore, was on the company to show that it was exempt from the duty imposed by those acts. It was admitted at the trial that the defendant is the successor of the Marietta & Cincinnati Railroad Company, as reorganized, and that the last-named company was the successor of the Marietta & Cincinnati Railroad Company, original constructor of the railroad, and that the Cincinnati, Washington & Baltimore Railroad Company, defendant, is the owner of the rights of way and franchises of the Marietta & Cincinnati Railroad Company. It is now claimed in argument that the Marietta & Cincinnati Railroad Company was originally incorporated as the Belpre & Cincinnati Railroad Company by special charter, March 8, 1845, and that by an act passed March 21, 1851, to amend the incorporation act of the Franklin & Ohio River Railroad Company, and for other purposes, it was provided that, upon certain subscriptions therein authorized being made, the name of the Belpre & Cincinnati Railroad Company should thereupon be changed to the Marietta & Cincinnati Railroad Company; that the subscriptions were paid, and the corporate name thereupon became changed at once to the Marietta & Cincinnati Railroad Company, and it always acted and was known by that name. It is not insisted that there is any allegation, proof, or admission of this claim. Reference is made to the several acts, which show the incorporation of the roads as stated. To sustain the statement that the subscriptions were paid, and hence that the corporate name became changed at once to the Marietta & Cincinnati Railroad Company, counsel cite the report of the commissioner of railroads for the year 1870, wherein it is stated that the subscriptions were made in conformity with the statute, and the name of the company changed to that of the Marietta & Cincinnati Railroad Company. The court is thus asked to take judicial notice, not only of the acts referred to, but of the statement contained in the report. If this can be done, the claim is sustained; if it cannot the claim fails, and there is nothing before the court to show when, or under what law, the Marietta & Cincinnati Railroad Company was organized.

Change of
name—Judicial notice of
railroad com-
missioners'
report.

There is apparent conflict of decision in this state as to what laws will be judicially noticed, and there is at least doubt whether the act of March 21, 1851, can be so noticed. The holding in *Brown v. State*, 11 Ohio, 277, is authority to the effect that such a law can be noticed, while the decision in *Pittsburgh C. & St. L. R. Co. Moore*, 33 Ohio St. 384, is to the contrary. We will not here attempt to reconcile these cases. But it may be said of the earlier act, that, although it is in the form of a special law, and classed among the local laws in the yearly volume, yet it is of a rather public than private nature, inasmuch as it contains grants of sovereignty, interesting as well to the community whose rights are thereby contracted, as to the corporation whose rights are thereby enlarged. And assuming, without holding, that both acts referred to may be judicially noticed, there still remains the question whether the contents of the commissioners' report can be so treated. There are certain executive documents, such as official proclamations, treaties with foreign powers, and other public documents issued by the executive or legislature, which courts will notice judicially, but an examination of an extended line of authorities fails to disclose a single holding to the effect that documents similar to that of the commissioners' report may be classed among those of which judicial notice will be taken. Nor can the claim be sustained upon reason.

In general, courts will judicially notice only such facts, or conclusions from facts, as are not the proper objects of evidence. Such are styled "non-evidential." 1 Whart. Ev. § 277. It cannot be said that the court, from its presumptive knowledge of the law or of public events, would have within judicial cognizance the statement of the commissioner of railroads as to an antecedent fact. The question whether or not the statute of March 21, 1851, had been complied with, could have been put in issue in the pleadings. It would then have been a proper subject of evidence, and could have been established or disproved by any witness having knowledge of the fact. This could not be true as to matters which the court may judicially notice. Whether or not this report would have been competent evidence, under proper pleadings, of the statement referred to, we need not inquire. Under the authority of some adjudicated cases, it would appear to be competent, while others (notably *Gordon v. Bucknell*, 38 Iowa, 438) would seem to hold the contrary. In the Iowa case the court held that the report of the register of the state land-office was not competent to show that certain lands in controversy had been patented to a railroad company. However, it is not with a question of evidence we are dealing, but with a question of what courts will notice without evidence.

We are of opinion that the report cannot be resorted to by the court for a knowledge of the statement therein contained, and without it there was nothing before the court to establish that the Marietta & Cincinnati Railroad Company, existing in 1853, was the company contemplated in the act of March 21, 1851. And inasmuch as proof that this company was organized prior to the act of May 1, 1852, was necessary to the company's defense, and is not shown except by the report referred to, such defense was necessarily unavailing. Judgment affirmed.

LOUISVILLE & NASHVILLE R. CO.

v.

BELCHER.

(*Kentucky Court of Appeals, October 15, 1889.*)

Stock-killing—Compensation for Expense of Fences—Action by Occupant.—The provision of section 2, chap. 57, Ky. Gen. Stat., that if cattle or other stock shall be killed or injured on a railroad "adjoining the lands belonging to or in the occupation of the owner of such cattle or stock, who has not received compensation for fencing said land along said road, the loss shall be divided between the railroad company and the owner of such cattle or stock," unless the company was guilty of negligence, only confers a right of action upon the occupant if neither he nor the owner of the lands has been compensated for fencing, and that fact must be alleged in the complaint.

Same—Constitutional Law—Deprivation of Property.—As the statute imposes the same liability on all railroad corporations for the protection of property, it is not unconstitutional as depriving them of their property by fixing a grade of liability that is not imposed on other citizens under like circumstances.

APPEAL from Circuit Court, Logan County.

Action by W. W. Belcher against the Louisville & Nashville R. Co. to enforce the statutory liability of the defendant for killing a horse belonging to the plaintiff. Defendant appeals from a judgment for the plaintiff.

W. F. Browder for appellant.

Thos. B. Blakey for appellee.

PRYOR, J.—Section 2, chap. 57, Gen. St. tit. "Injuries to

Person or Property," provides: "If by the locomotives or cars of a railroad company, cattle or other stock shall be killed or injured on the track of said road, adjoining the lands belonging to or in the occupation of the owner of such cattle or stock, who has not received compensation for fencing said land along said road, the loss shall be divided between the railroad company and the owner of such cattle or stock, unless the killing or injury arose from the willful act or carelessness or negligence of the agents or servants of such company, in which case the whole loss shall be paid by such company."

**Kentucky
statute.**

As we construe this statute, the question of negligence on the part of the company is not required to be alleged or proven in order to entitle the owner of the stock killed or injured to recover of the company one-half the loss sustained. This action by the appellee is based on the statute, and, a recovery having been had in the court below on an admission of the facts alleged by the demurrer filed, the sole question presented is: Did the facts alleged, if true, authorize the judgment, the appellant having declined to amend when the general demurrer was overruled? It is alleged by the plaintiff that his horse was killed on the track of the railroad adjoining the lands in his occupancy, and that he had not received compensation from the company for fencing along said road. All the essentials to constitute a cause of action are set forth, except the alleged failure on the part of the company to compensate the owner of the land to enable him to make the fencing. If neither the owner nor the one occupying the land adjoining the track of the company where the stock was injured had received compensation, a right of action existed for the loss sustained. Under the statute, however, compensation may not have been made the one in possession, and still no cause of action will accrue to the occupant if compensation had been made the owner of the adjoining land. The statute reads, "killed or injured on the track of said road, adjoining the lands belonging to or in the occupation of the owner of such cattle or stock, who has not received compensation." The owner of the land may recover when no compensation has been made him, or the occupant may recover if neither has been compensated. If the fact that the owner of the land have not been furnished with the means to construct the fence is a matter of defense, then that fact should have been pleaded, and the demurrer was properly overruled.

**Plaintiff must
negative com-
pensation to
occupant and
owner.**

The presumption must arise from the averment that the plaintiff occupied the premises; that he was not the real own-

er; and, if compensation has been made the owner, this action must fail. If, then, under this section of the statute, the facts alleged by the plaintiff could be admitted, and still, by reason of the very clause upon which the recovery depends, a state of fact might exist preventing the recovery, the existence of such facts must be negatived by his pleading. The general rule in pleading, "that matter which should come more properly from the other side need not be stated," does not apply to a case like this. The general rule, says Mr. Bliss, in declaring on a deed or other instrument consisting of distinct parts, is only to state so much as makes, *prima facie*, a cause of action; and, if any other part furnishes the means of defeating the action, it comes from the defense. The difference is "when the exception is embodied in the body of the clause, he who pleads the clause ought to plead the exception; but where there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to his adversary to show the proviso." It is well understood that if the proviso is in the body of the covenant in the nature of an exception, the liability must be consistent with the exception, and must be noticed by the pleader. Bliss Code Pl. § 202. Mr. Newman, in his work on Pleading, says: If the defendant's promise contains, as part of it, an exception which qualifies his liability, or, in certain contingencies, renders him altogether irresponsible, the petition must ordinarily notice the exception or proviso. But when the proviso is distinct from the promise made, and does not vary its legal effect, it is not necessary to notice it." Page 398.

The obligation on the part of the company, imposed by the statute is to furnish the owner or the occupant the means to construct fencing, in order to prevent the injuries complained of. The body of the statute in the one section, and in the same sentence, relieves the company from liability upon compensation to either party; and, while it may be neither an exception or proviso in a technical sense, it is plain that the clause of the statute under which the recovery is sought makes the right of action, when the occupant sues, depend upon the failure by the company to compensate either the owner or the occupant to enable them to provide against such loss.

As this case must go back, with directions to sustain the demurrer with leave to amend, it is proper to notice the constitutional question raised by the appellant. It is argued the appellant is deprived of his property by this statute that fixes one grade of liability for it that is not imposed on other citizens under like circumstances. We understand that the same liability is im-

Constitution-
ality of stat-
ute.

posed on all such corporations, and when exclusive, or, if not exclusive, extraordinary rights and privileges are granted such corporations, there is no reason why some liability should not attach for the protection of both person and property. While the consideration for such peculiar privileges granted to corporations is the benefit to the public, the danger resulting from the operation of railways demands some legislation that will result in an equitable adjustment of the loss between the owner of stock and the railroad company, where the latter, whether negligently or by accident, destroys it. Such legislation is not inhibited by any provision of the constitution; and when such rights and privileges are conferred on corporations that do not pertain to the citizen, and of which the citizen cannot complain, certain liabilities will necessarily attach for the privileges granted. The common-law liability has been changed by repeated statutes, and the rights and duties of corporations regulated by such legislation as was deemed necessary for the protection of property; and we think there is no room to question the constitutionality of the act under which this judgment was rendered.

For the reasons indicated the judgment is reversed, with directions to sustain the demurrer, with leave to the plaintiff to amend, and for proceedings consistent with this opinion. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512; 22 Am. & Eng. R. Cas. 557; *Mackie v. Central R. Co.*, 54 Iowa, 540; *Johnson v. Chicago, M. & St. P. R. Co.*, 27 Minn. 425.

RIPPE

v.

CHICAGO, MILWAUKEE & ST. PAUL R. Co.

(*Minnesota Supreme Court, November 18, 1889.*)

Stock-killing—Fences—Railroad in Public Street.—Where a railroad occupies a public street in a city or village, subject to the public easement, it is not entitled to fence its track, and thereby obstruct the street, and interfere with its use.

APPEAL from District Court, Houston County.

Action by John H. Rippe against the Chicago, Milwaukee

& St. Paul R. Co. to recover damages for injuries to a cow. Defendant appeals from a judgment for the plaintiff.

W. H. Harris and John T. Fish for appellant.

James O'Brien for respondent.

PER CURIAM. Upon the record in this case the plaintiff is not, we think, shown to be entitled to recover. At the place where the plaintiff's cow was injured by one of defendant's engines in the village of Brownsville, and for a considerable distance each way, its railway is laid in the street, as clearly appears from the town-plat, and other evidence introduced on the trial. The street, as shown on the plat, does not appear to have been vacated, and for the purposes of this case the track must be presumed to be lawfully there. No issue or question is made in the case in that matter. It would seem to be a case where a public street is jointly occupied by the public and the company, though the public travel, as would naturally be the case, goes to the side most convenient, and where there is the most room. We are not warranted in holding that the defendant has acquired an exclusive right to a definite portion of the street, so that it would have a right to divide the street by a fence so as to cut off all approach to the other side of the street except at cross-streets. The plaintiff claims that the railway might be fenced without seriously obstructing it, but he admits that the fence would be erected in the street, and that, if it were built 12½ feet from the center of the track, allowing sufficient space to operate the road, the road-way left for the public would remain only 15 to 25 feet in width. Other witnesses make it still less. It is manifest that in any event a fence as proposed in the street would amount to an obstruction, which it does not appear that the defendant would have a right to make, and the evidence presumptively, we think, brings the case within the implied exceptions to the statutory rule requiring fences. Judgment reversed.

COLLINS, J., did not sit.

Right to fence
track laid in
street.

DOW *et al.*

v.

KING.

(Arkansas Supreme Court, December 14, 1889.)

Animals—Replevin for Injured Animal—Conversion.—In replevin to recover the possession of a mule injured by a railroad company against which the owner had obtained judgment as for a total loss, a plea by the company that the original action was for the conversion of the mule is bad, if it does not allege a satisfaction of the judgment recovered for the conversion.

Same—Title of Company.—Although the owner of a mule recovered a judgment against a railroad company as for a total loss, the company does not thereby acquire any title to the mule.

APPEAL from Circuit Court, Lonoke County.

Replevin by R. R. King against one Lessum to recover a mule which the defendant had taken charge of at plaintiff's request after it had been injured upon a railroad. The plaintiff had sued the Memphis & Little Rock R. Co. for causing the injury to the mule and had recovered damages. In the action of replevin, R. K. Dow and others, the trustees of the railroad company, filed an interplea alleging that while operating the road, the company had injured the mule, that thereupon plaintiff had brought suit and has recovered as for a total loss, and that the mule had thereby become the property of the interpleaders. A demurrer to the interplea having been sustained, the interpleaders appealed.

U. M. & G. B. Rose for appellants.

T. C. Trimble and John C. & C. W. England for appellee.

PER CURIAM. The interplea is bad, whether the original action against the railway was for the conversion of the mule, or for damages for injury done it. In the former case it should have alleged a satisfaction of the judgment recovered for the conversion, (Cooley, **Conversion—Title to animal.** Torts, 458;) and in the latter event the interpleaders had no claim to the property at all. Affirm.

Stock-killing—Damages—Conversion of Animal.—In an action to recover damages for the killing of a cow, the plaintiff is entitled to compensa-

tion to the extent of the injuries done in actions for trespass—not as in trover, to the full value of the property converted. Accordingly, as the animal was still the plaintiff's property he was bound to make such reasonable disposition of the carcass as would proportionately diminish his damages, *e.g.*, by selling it, if it was of any value for beef. *Roberts v. Richmond & D. R. Co. (N. Car.)*, 20 Am. & Eng. R. Cas. 475. See also *Illinois Cent. R. Co. v. Finnigan*, 21 Ill. 645.

Same—Abandonment.—But under a statute which provides the owner may recover the value of the animal killed or the injury done, the owner of an animal killed has the right to abandon it, and hold the company for the value of the animal when injured. *Ohio & M. R. Co. v. Hays*, 35 Ind. 173. See also *Indianapolis, P. & C. R. Co. v. Mustard*, 34 Ind. 50.

NELSON

v.

MINNEAPOLIS & ST. LOUIS R. CO.

(*Minnesota Supreme Court, June 27, 1889.*)

Fences—Compensation for Failure to Construct.—A railway company is liable for damages to an abutting farm, rendering its use less valuable, caused by a failure to fence its road.

Same—Measure of Damages—Rental Value.—The measure of damages in such a case is the depreciation in the rental value of the farm, which means the value of its use for any purpose for which it is adapted in the hands of a prudent and discreet farmer upon a judicious system of husbandry; and evidence of any fact tending to show how and to what extent the absence of a railway fence injuriously affected the value of such use is competent.

APPEAL from District Court, Freeborn County.

Action by Ole Nelson against the Minneapolis & St. Louis R. Co. to recover damages for defendant's failure to fence its right of way through plaintiff's farm. Defendant appeals from a judgment for the plaintiff.

B. S. Lewis and F. D. Springer for appellant.

Lovely, Morgan & Morgan and *Walter F. Trask* for respondent.

MITCHELL, J.—This action is similar to that of *Emmons v. Minneapolis & St. L. R. Co.*, 35 Minn. 503, in which we held that, under Gen. St. 1878, chap. 34, § 57, a railway company is liable for damages to an abutting farm, rendering its use

less valuable, caused by a failure to fence its road. Counsel for the defendant asks us to reconsider the question, and overrule that case. After a careful consideration of his argument our views remain unchanged. We do not propose to re-enter upon a discussion of the question further than to say that we think the fallacy of counsel's argument consists in assuming that, because the statute requiring railways to fence their roads is a police regulation, the object of which is to prevent animals from getting upon the track, and the consequent danger to the animals themselves and to railway passengers and employes, therefore it is in excess of the police power of the state to impose any liabilities for non-compliance with the law other than for resultant injuries to animals and railway passengers and employes. The police legislation of the country abounds in the imposition of penalties and liabilities, beyond such resultant injuries, as a means of enforcing strict compliance with the statute; and we know of no means more likely to insure prompt obedience to the requirements of this "fence law" than the provisions of section 57, as construed in the Emmons Case.

2. The assignments of error in the admission of evidence and in the charge of the court all go to the question of the proper measure of damages in such a case, and how these damages may be proven. In *Emmons v. Minneapolis & St. L. R. Co.*, 38 Minn. 215, 35 Am. & Eng. R. Cas. 126, it was held that the measure of damages is the injury to the rental value of the farm. The term "rental value" is but another form of saying the "value of the use," and means simply the value of the use of the land for any purpose for which it is adapted in the hands of a prudent and discreet occupant upon a judicious system of husbandry. A man is not bound to rent his farm for a cash rent, or to show that he could have done so, in order to recover for injuries to its use. What the law aims at is compensation; and the matter of ascertaining the rental value, or how much it has been depreciated, is a practical question, to be treated in a practical way, and to the consideration of which it is necessary to bring a little of the farmer as well as the lawyer. It can be stated generally that evidence of any fact which would have tended to show how and to what extent the absence of a railroad fence injuriously affected the value of the use of the farm would have been competent. The case was rather loosely tried, and some parts of the charge of the court, when taken by themselves, seem unguardedly expressed; but as to whether, in the admission of evidence as to the depreciation of rental value, the trial court exceeded the limits of the rule above suggested, and as to whether, taking the charge as a whole and as applied

to the evidence, it contained any prejudicial error in laying down the measure of damages, the judges who heard the argument are equally divided. Therefore the judgment appealed from must be affirmed.

COLLINS, J., absent, took no part.

EMMONS

v.

MINNEAPOLIS & ST. LOUIS R. Co.

(*Minnesota Supreme Court, June 27, 1889.*)

Failure to Construct Fence—Compensation—Opinion Evidence.—The issue being how much the rental value of an abutting farm is diminished by reason of a railway not being fenced, an expert witness may be asked either what would be the difference between the rental value with the road fenced and with the road unfenced, or, first, what the rental value would be with the road fenced, and then what it would be with it unfenced. Either mode of examination is permissible in the discretion of the trial court.

APPEAL from District Court, Freeborn County.

B. S. Lewis and J. D. Springer for appellant.

Lovely, Morgan & Morgan and Walter J. Trask for respondent.

MITCHELL, J.—This case has already been twice before this court, (35 Minn. 503, and 38 Minn. 215, 35 Am. & Eng. R. Cas. 126,) and every question, except one, involved in the appeal was passed upon in the similar case of *Nelson v. Minneapolis & St. L. R. Co.*, *ante*, p. 234, (just decided.)

Upon the trial, expert witnesses were asked and permitted to answer the question, what in their opinion, was the difference between the rental value of the farm with the railroad fenced and the rental value with the railroad unfenced. Defendant assigns this as error, claiming that the proper mode of examination is to ask a witness, first, what would be the rental value with the road fenced, and then what it is with it unfenced and leave it to the jury to say what the difference is. Some courts disapprove of the first method of examination, holding that the latter is the only proper one. Probably the latter is

Expert testimony as to depreciation in value.

preferable, inasmuch as, if the witness gives the rental values with and without the fence, the jury can see in what ratio or percentage the rental value is, in his opinion, diminished by reason of the want of the fence. But we do not think it a matter of great practical importance. If the opposite party desires to ascertain the basis of the witness' opinion he can ask these questions on cross-examination. Both modes of examination have been pursued indiscriminately in analogous cases in this state for many years, and the mode followed in the present case has been repeatedly recognized with implied approval by this court. See *Simmons v. St. Paul & C. R. Co.*, 18 Minn. 184, (Gil. 168;) *Lehmicke v. St. Paul, S. & T. F. R. Co.*, 19 Minn. 464, (Gil. 406;) *Leber v. Minneapolis & N. W. R. Co.*, 29. Minn. 256. We do not feel disposed to change the practice at this late day. The trial judge may, in his discretion, permit either form of examination. Judgment affirmed.

KNOWLTON

v.

NEW YORK & NEW ENGLAND R. CO.

(147 *Mass.* 606.)

Fires—Action for Damages to Separate Lots—Res Adjudicata.—Where the owner of two lots brings a suit against a railroad company to recover damages thereto by fire set by one of the defendant's locomotives and recovers a judgment therein, he cannot, if in such action he claims damages for the injury to both lots, bring a subsequent suit for the injury to one of the lots, on the ground that the recovery in the first action was in fact limited to the other lot.

ON EXCEPTIONS FROM SUPERIOR COURT, WORCESTER COUNTY.

Tort by Edwin F. Knowlton, as administrator of William Knowlton, deceased, against the New York & New England R. Co. for damages to woodlands belonging to plaintiff's intestate caused by fire alleged to have been communicated by a locomotive engine belonging to the defendant. The jury having returned a verdict for the defendant, the plaintiff excepted.

Kent & Dewey for plaintiff.

F. P. Goulding for defendant.

C. ALLEN, J.—At first sight of the bill of exceptions, the facts in this case appear to be rather involved, but those which we have found to be material to the decision are simple. *Case stated.* The original plaintiff, William Knowlton, was the owner of two lots of woodland, lying separate from each other, one of which was called the "Taft and Chase Lot," and the other the "Southwick Lot." On the 5th of May, 1881, a fire communicated from a locomotive engine of the defendant, caught upon the Taft and Chase lot, adjoining the railroad, and spread over the intervening space, about half a mile, to the Southwick lot, doing damage to both lots. For this damage, and also for another cause of action now immaterial, Knowlton brought a suit against the defendant on the 24th of October, 1882. The first count, after describing the two lots of land, set forth that "the defendant's locomotive engine, in the defendant's use and operation, communicated fire to the plaintiff's said land, and burned over and destroyed the timber, wood, and other growth thereon, being to the extent of about thirty acres of the second-described lot of land, and to the extent of about forty acres of the first-described lot." The whole claim for damages to both lots was thus set forth in one count. There was evidence tending to show that there was also another fire which burned over the Southwick lot on September 2, 1883, and Knowlton brought a second action (which is the case now before us) in November, 1883, claiming damages for burning the Southwick lot, without alleging when the fire occurred. The first action was referred to arbitrators, who made an award in favor of the plaintiff, upon which judgment was afterwards entered, and the judgment was paid by the defendant. At the trial of the second action the plaintiff did not seek to recover damages arising from the fire of September 2, 1883, but sought only to recover for the damage done to the Southwick lot by the fire of May 5, 1881, and offered to show, by the testimony of the arbitrators, that, in making their award, they did not include any damages to that lot; and the plaintiff contended that therefore the judgment in the first action did not include such damages.

Assuming this to be true, without considering at all as to the competency of the evidence offered, and assuming also that the second action may fairly be deemed to have been commenced to recover damages to the Southwick lot from the first fire—a point which is certainly doubtful—it is nevertheless plain that the action cannot be maintained, for the case falls fully within the principle of the decision in *Trask v. Hartford & N. H. R. Co.*, 2 Allen (Mass.), 331. In that case plaintiff brought an action

Doctrine of res adjudicata.

and recovered judgment therein against a railroad company, for the loss of a shop by fire communicated by one of its locomotive engines. He afterwards brought another action, for the benefit of an insurance company, to recover for the loss of a dwelling house and shed which took fire from the burning of the shop; but it was held that the first judgment was a bar. Mr. Justice MERRICK, in delivering the opinion of the court, said: "The loss of the shop and of the dwelling house and shed were distinct items or grounds of damage, but they were both the result of a single and indivisible act. The plaintiff, therefore, does not show any right to maintain another action to recover additional damages merely by showing that, in consequence of his omission to produce upon the trial all the evidence which was admissible in his behalf, he failed to obtain the full amount of compensation to which, in that event, he might have been entitled. * * * It would be unjust, as well as in violation of the fixed rule of law, to allow him to subject the defendants to the hazard and expenses of another suit to obtain an advantage which he lost either by his own carelessness and neglect, or by an intentional withholding of a part of his proof." The doctrine of this decision was reaffirmed in *Goodrich v. Yale*, 8 Allen (Mass.), 454, 456, 458. See, also, *Folsom v. Clemence*, 119 Mass. 473.

The plaintiff seeks to distinguish the present case from that on the ground that the damage to the Southwick lot constituted a separate cause of action. But the two cases are indistinguishable. It was held in *Perley v. Eastern R. Co.*, 98 Mass. 414, that the burning of a piece of woodland, situated half a mile from the railroad track, by a fire which spread over intermediate land from grass near the track which was set on fire by a cinder from a locomotive engine, was a loss for which the railroad company was responsible, and that the fire was none the less communicated from the engine because the intermediate land belonged to other persons, nor because the distance was half a mile. The statute upon which the present action is founded is similar to the statute upon which that case rested. Pub. St., chap. 112, § 214; St. 1874, chap. 372, § 106; Gen. St., chap. 63, § 101. The defendant's act causing the fire was single. The burning over of the Southwick lot by the spreading of the fire gave no new cause of action, but only additional damages resulting from the original cause of action. Otherwise the plaintiff would have as many causes of action as the number of separate lots which he owned, and which were burned over by the same fire. Moreover, the plaintiff's counsel in the first action properly treated the cause of action as single, by putting the claim for damages to both lots into one count. No objection appears to have

been raised to the declaration, on the ground that two causes of action were included in one count, nor could such objection have prevailed. There was no new act of the defendant after the fire began on the first lot. The case is not like those of continuing injuries, as by a nuisance, where every continuance may be deemed a new injury. *Warner v. Bacon*, 8 Gray (Mass.), 397, 406, 407. Exceptions overruled.

O'NEILL

v.

NEW YORK, ONTARIO & WESTERN R. CO.

(New York Court of Appeals, October 8, 1889.)

Fires—Combustible Material on Track—Liability.—Immediately after the passage of a train, smoke was seen rising from places on the land of the railroad company close to the track. By the side of the defendant's track cut brush and leaves, and old ties were piled up. There was evidence tending to show that sparks were seen coming from the locomotive. There was no evidence that the engine which was said to have caused the fire, was out of repair or improperly constructed, or that the spark arrester was not sufficient. *Held*, that the evidence showing that refuse material had been allowed to remain on the track, was sufficient to justify a verdict finding the railroad company guilty of negligence in causing the fire.

Same—Remoteness of Damage—Intervening Lands.—Although the land of a third party intervened between the lands of plaintiff which were damaged by fire, and the defendant's road, the injury to plaintiff's land is not too remote to warrant a recovery if it can be shown that the result might have been anticipated from the dropping of fire on defendant's premises, and that the destruction which happened to plaintiff's property was the natural and direct effect of the first fire.

APPEAL from General Term of the Supreme Court, Third Department.

Action by Amanda O'Neill against the New York, Ontario & Western R. Co. to recover damages for negligently setting fire to woodlands belonging to the plaintiff. The jury returned a verdict for the plaintiff and judgment was entered thereon. Upon appeal to the general term, the judgment was affirmed. See 45 Hun. (N. Y.) 458. The defendant thereupon appealed.

Geo. H. Carpenter for appellant.

W. F. O'Neill for respondent.

DANFORTH, J. —The questions in this case are brought before us by the defendant's appeal from a judgment of the general term of the third judicial department, affirming a judgment in favor of the plaintiff upon the verdict of the jury, and affirming an order made by the trial court denying the defendant's motion for a new trial. No question is made upon the pleadings. The complaint, among other things, stated the incorporation of the defendant, and that its road ran through the town of Fallsburgh. So much the defendant, by its answer, admitted. The complaint also stated that the plaintiff at the time in question was the owner of certain woodlands lying near the railroad; that these were set on fire through the negligence of the defendant in the use and construction of its locomotive, and by means of sparks and coals thrown from it; and that the defendant was otherwise negligent in placing or permitting to accumulate upon its premises, "brush, old ties, cut grass, and other dry and combustible materials," easily ignited, and through which fire communicated to the plaintiff's woods to her injury. These allegations were denied, and the issues so formed raised the questions between the parties.

The plaintiff went into evidence, and when she rested the defendant's counsel claimed it to be insufficient for want of showing that the engine from which the fire was said to have originated "was out of repair, or improperly constructed, or that the spark-arrester attached thereto was not as good, safe, and effective as any contrivance for that purpose in known use," and also claimed that negligence "cannot be found from combustibles along the track." The motion was denied, and the defendant called and examined witnesses, whose testimony, with that of the plaintiff, was submitted to the jury as bearing upon three questions: "*First*. Whether the engine was out of order or repair as to its apparatus for arresting sparks. *Second*. Whether the engine was supplied with the most approved method of arresting sparks in known use. Assuming that these questions were answered in favor of the defendant, then, *third*, was the company negligent in placing combustible materials so near the track that they would be likely to take fire from sparks of the engine necessarily emitted, and thence, as a natural and probable result, firing the plaintiff's woods?"

On this appeal it is not denied that the plaintiff suffered loss of property by fire. The defendant's claim is that there was not sufficient evidence for the jury to consider upon the question whether the defendant negligently caused the fire. The burning occurred in the day time. Immediately after the passage of the "express

Sufficiency of evidence.

freight " through a tunnel, about 12 o'clock, or a little after, smoke was seen rising from the places on the land of the company, close to the track, and along its side. The fire at once began to run, and spread rapidly " onto the land of one Carley," and from there to the lands of the plaintiff. By the side of the defendant's land were cut brush, and leaves, and old ties piled up. Before the train came along there was no smoke or other appearance of fire. Sparks were seen coming from the engine; one witness says, " Probably, and as I judge, as large as a pea." Another says, " I saw the train when it came out of the tunnel," and " she set fire right at the approach of the tunnel." The engine was throwing large volumes of smoke and sparks. They seemed unusually large — " as large as walnuts." " She set fire three or four times to this old brush, old bark, and stuff that falls off the train, and brush they cut down and left there. They rolled the brush up near the mouth of the tunnel on the east side, and the fire caught on there, and went northeast. That was towards the plaintiff's land." The witness watched the progress of the fire a few minutes, and then " went for a pail." If this evidence is true, the plaintiff's case was good until contradicted. If contradicted, the question was for the jury, and not the judge. It was not wrong for him to say whether the inference of negligence could be drawn from it. It was for the jury to say whether it should be drawn. No doubt the eyes of some witnesses are livelier than those of others, and the sense of sight may be quickened or diminished by the interest or bias of him who possesses it. But no court can define or limit the degree of credibility due a witness, for that, as well as the weight of evidence, is for the jury. In *Field v. New York Cent. R. Co.*, 32 N. Y. 346, it was held that " the fact that the sparks or coal were scattered at all upon the defendant's roadway in such quantities as to endanger property on abutting premises, raised an inference of some weight that the engines were improperly constructed or managed." There was, moreover, in the plaintiff's case, abundant evidence of conduct on the defendant's part in so storing its refuse material, and retaining upon its premises brush and other refuse matter, as to make it quite right and proper for the jury to declare it negligent. If, as the defendant claims, the escape of fire from an engine is inevitable, and a necessary consequence of its useful employment, the defendant was at least bound to move combustible material from its path, or at least prevent such accumulation of rubbish as would, in consequence of fire falling upon it, be the cause of danger to another's property. *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420. The fire on the track was its fire as much

as if confined in the engine, and it owed a like duty to see that it did no harm.

It is also said by the appellant that "the damages are too remote." The proposition is put upon the ground that the plaintiff's lands did not lie next to the railroad, but was separated from it by the lands of another. That circumstance is in the case, but no allusion was made to it upon the trial as a ground of defense, and it is conceded by the learned counsel for the appellant that the point now presented was not raised in the trial court. It therefore cannot be listened to. *Salisbury v. Howe*, 87 N. Y. 128. The case was tried upon its merits, and it was assumed by the defendant's counsel, in stating grounds for a nonsuit, that the plaintiff would be entitled to recover if the fire was caused by the imperfection of its locomotive, or if negligence could be predicated from the accumulation of "combustibles along the track." In either of these events the liability of the defendant was conceded, and there was no suggestion that the damage sustained by the plaintiff was not the natural and probable consequence of defendant's act or omission. But the appellant urges that the objection, if made at the trial, could not have been obviated, and therefore claims that it may be raised at any time. The fact that land of a third party intervened between the woodland of the plaintiff and the defendant's road cannot be doubted; but that alone is not decisive. Other circumstances would control; and, if not already apparent in evidence, we cannot say that further testimony would not have shown that the result was to have been anticipated from the moment fire dropped upon the defendant's premises, and that the destruction which happened to the plaintiff's property was the natural and direct effect of the first firing. If so, it was not remote. *Vandenburgh v. Truax*, 4 Denio (N. Y.) 464; *Pollett v. Long*, 56 N. Y. 200; *Webb v. Rome, W. & O. R. Co.*, *supra*. *Ryan's Case*, 35 N. Y. 210, relied upon by the defendant, is sufficiently commented on in the last two cases cited, and is not analogous to this case is now presented.

The origin of the fire, upon the evidence and the verdict of the jury, under proper instructions from the court, is to be attributed to the defendant, and to have been occasioned by its negligence. By its negligence, therefore, the fire which burned the plaintiff's woodlands was set in operation. The fact that it reached those woodlands by first burning the brush and other articles on other land, furnishes no new cause to which the injury can be ascribed. What other circumstances might have been proven, had the attention of the plaintiff been called to the objection now made, we cannot

say. The issues were disposed of at the trial, irrespective of the question, and it needs no further discussion. It is also claimed that errors occurred in rulings on evidence and on requests to charge. We have examined the exceptions so presented, and find not one which requires other comment than that they appear to be without merit. The judgment and order appealed from should be affirmed. All concur, except PECKHAM, J., not sitting.

ABBOTT *et al.*

v.

GORE.

(*Wisconsin Supreme Court, October 15, 1889.*)

Fires—Negligence—Combustibles on Track—Special Finding—In an action to recover damages for negligently setting fire to plaintiff's property, a special finding that the defendant was negligent in leaving ties, grass and other combustible material on the right of way, is sufficient as it imports that the defendant was negligent in leaving combustible matter on the right of way and that such negligence caused the fire, although there was no express finding in the special verdict that the fire originated in the right of way, and consequently none that it originated in such combustible material.

Same—Negligence in Operating Engine—Evidence—Harmless Error—In an action to recover damages for negligently setting fire to plaintiff's property, testimony to the effect that it was the custom to break trains at that point and haul them up an ascending grade in sections, which was not done with the train in question, is, even if erroneously admitted, immaterial, where the jury finds that the engine was properly managed and operated.

Same—Cause of Fire—Evidence—Passing of Engine—Evidence that the engine passed shortly before the fire was discovered, tends to show in the absence of proof of any other cause, that the engine set the fire, notwithstanding it was in good order and properly managed, and an instruction that the fact that the fire was so discovered after the passing of an engine in safe and proper condition and properly managed, is not evidence that such engine set the fire, is properly refused.

Same—Combustibles on Right of Way—Negligence Per Se—An instruction to the jury that it must consider whether there was any negligence on the part of the defendant in leaving bark and grass and other combustible material, if there was any such, within their right of way, is not open to the

objection that the jury must infer that by so leaving bark and grass within the right of way, the defendant was guilty of negligence *per se*.

ERROR to Circuit Court, Winnebago County.

The defendant in error, Jacob Gore, brought his action in the circuit court against Abbott and Stewart, the plaintiffs in error, to recover the value of a quantity of hay belonging to him and to certain other persons, who before the action was brought, assigned their claims to him. The hay in question was standing in stacks on a marsh adjacent to the line of the Wisconsin Central Railroad, operated by the plaintiffs in error as trustees, and was burned, as is alleged, in consequence of their negligence in operating the railroad. The negligence charged is that at the place where the fire commenced, combustible materials had been allowed to remain on the right of way of the railroad company; that the locomotive engine which set the fire was not provided with proper appliances to prevent the escape of fire; and that such engine was being run at the time at too great a rate of speed for its capacity, thereby causing it to emit an increased quantity of fire. The testimony and rulings of the court on the trial are sufficiently stated in the opinion. A special verdict was demanded, and returned by the jury as follows: "(1) Did a freight train drawn by locomotive engine No. 65 pass the place where the fire originated, shortly before the fire was discovered? *Answer*. Yes. (2) Was locomotive engine No. 65 in a safe and proper condition in all respects, and provided with all reasonably known appliances to prevent the escape of fire, and in charge of a competent engineer, and properly managed? *A*. Yes. (Answered by the court.) (3) Were the defendants guilty of negligence, which caused the fire and consequently destroyed the property of the plaintiff and his assignors? *A*. Yes. (Answered by the court.) (4) If you answer the foregoing question in the affirmative, state in what respects such negligence consisted. *A*. By leaving ties, grass, and other combustible material on the right of way of the Wisconsin Central Railroad Company. (5) Was the fire set by the engine? *A*. Yes." The jury also assessed the value of the hay. The defendants below moved for judgment on the verdict, and also for a new trial. Both motions were denied by the court, and judgment for the plaintiff below was rendered for the value of the hay as assessed and for costs. The defendants below thereupon sued out a writ of error from this court to obtain a review and reversal of such judgment.

Chas. W. Felker, (D. S. Weggand Howard Morris, of counsel) for plaintiffs in error.

Gabriel Brouck for defendant in error.

LYON, J.,—Inasmuch as the locomotive engine No. 65 which passed the place of the fire recently before the fire was discovered, was in proper condition and properly managed and operated, the plaintiff below was not entitled to recover unless the fire originated on the right of way of the railroad company, and in the combustible materials which the jury found were negligently left thereon. If it originated outside the right of way, or within it, at another point, and spread from thence over the marsh on which the hay was stacked, the only negligence which the verdict imputes to the defendants below, to-wit, the leaving of combustible materials on the right of way, was not the proximate cause of the fire, and there can be no recovery in the action. There is no express finding in the special verdict that the fire originated in the right of way, and consequently none that it originated in such combustible materials. Is the omission fatal to the judgment? It is not if such omitted finding can fairly be deduced from the other findings. *Eldred v. Oconto Co.*, 33 Wis. 133: *Hutchinson v. Railroad Co.*, 41 Wis. 541. We think the reasonable inference from the other findings is that the fire originated in such combustible materials on the right of way. What other deduction can be made, or inference drawn, from the findings that the trustees negligently left combustible matter on the right of way, and that such negligence caused the fire which destroyed the hay? Had the fire originated off the right of way, or elsewhere on it, and spread from thence over the marsh, the imputed negligence could have had no connection with the burning of the hay, and the jury could not have found that it was the cause of such burning. We conclude, therefore, that such omission is not fatal to the judgment. Of course, it would have been better practice to have submitted to the jury, in express terms, the question, where did the fire start? Had the defendants asked the court to submit this question we do not say a refusal to do so would not have been error. In this connection it may be observed that we find ample testimony in the record to support the finding that the fire originated in such combustible materials on the railroad right of way.

The remaining exceptions relied upon as ground for reversal of the judgment are predicated upon the rulings of the court on the trial. These will now be briefly considered.

1. It appeared that at or near the place where the fire started the track was upon an ascending grade, going towards Neenah, in which direction engine No. 65 was running at the time; also, that such engine was hauling a train of 18 freight-cars. The court against objection, allowed testimony to the

effect that it was the custom to break trains at that point and haul them up the grade in sections, which was not done with the train in question. Probably, the testimony was admissible, within the issues, as tending to show the manner in which the engine was managed and operated. But whether it was so admissible or not is rendered immaterial by the fact that the jury found such engine was properly managed and operated.

Evidence as to manner of operating engine.

2. The court refused to give an instruction proposed by defendants below, as follows: "The fact that the fire was discovered on or near the right of way of the defendants shortly after the passing of an engine that was in a safe and perfect and proper condition and in charge of a competent engineer, and properly managed, is no evidence that such engine set such fire, and furnishes no evidence from which you may infer that such engine set such fire." The vice in this proposed instruction is, it assumes that an engine in proper condition, and properly managed, could not have set the fire. This proposition is against common knowledge. The fact that the engine passed shortly before the fire was discovered, (about 10 minutes before, as some of the witnesses testify,) is some evidence tending to show, in the absence of proof of any other cause, that the engine did set the fire, notwithstanding it was in good order and properly managed. We think the instruction was properly refused.

Presumption arising from passing of engine.

3. Error is assigned upon the following passage in the charge to the jury: "Now, the only negligence which is left to you under the rulings of the court to consider is the question whether there was any negligence on the part of the defendants in leaving bark and grass, as testified to by the witnesses, and other combustible material, if there was any such within their right of way or not." The criticism, made upon this passage in the charge is that the jury might have understood the court to assume that by so leaving bark and grass within their right of way they were guilty of negligence *per se*. We should be inclined to think this criticism hypercritical had not the learned counsel assured us that it is not. We think, however, that there is no foundation for it in the language of the charge. The juror of average intelligence would, we are sure, understand that the instruction left the jury free to find from the testimony whether the leaving of such combustible material on the track was or was not negligence.

Combustible material on track—Negligence *per se*.

It is believed that the views above expressed dispose of all exceptions not specifically discussed and determined. Find,

ing no error disclosed by the record, we cannot disturb the judgment of the circuit court. Judgment affirmed.

Fires—Combustible Matter on Right of Way.—See *Flannigan v. Canadian Pac. R. Co.*, (Ont.) 38 Am. & Eng. R. Cas., 362, note, 365; *O'Neill v. New York, O. & W. R. Co.*, (N. Y.) *ante*, p. 240.

FORT WORTH & NEW ORLEANS R. CO.

v.

WALLACE.

(*Texas Supreme Court, October 22, 1889.*)

Fires—Measure of Damages—Value of Grass for Hay or Pasturage.—Although the petition in an action to recover damages for the burning of grass contains no averment as to the particular manner in which the plaintiff desired to use the grass, the jury may consider its market value for pasturage or hay purposes, if there is evidence as to the value for either purpose.

Same—Damages—Injury to Turf.—Where the plaintiff alleges that there was a good turf, well and thickly set, on plaintiff's land; that the fire parched the turf, roots and sod of the grass so as to greatly injure and damage the same; that on account of the injury to the turf, it will be three or four years before the turf will become as productive as it was before the fire, it is not error to instruct the jury that if defendant was negligent, plaintiff is entitled to recover the amount of damages or injury done by the burning of said sod of the grass or turf, and that in estimating this damage it should be governed by the difference of the value in plaintiff's land immediately before and immediately after the injury.

Same—Damages—Suitability of Lands for Cropping.—In estimating the damages to the land caused by the burning of the sod or turf, the jury cannot take into consideration, in mitigation thereof, the fact that the destruction of the turf renders it less difficult to place the land in crop than it otherwise would have been, the owner being entitled to recover damages according to the injury to his land for any lawful purpose to which he might have appropriated it, or to which it was adapted.

Same—Presumption of Negligence—Instructions.—In the absence of testimony tending to rebut the *prima facie* case of negligence, made by showing that the burning was caused by fire that escaped from defendant's engine and that inflammable matter had been permitted to accumulate on the right of way, it is not error for the court to instruct the jury that if defendant's engine emitted sparks that set fire to the grass, if any, accumulated on the defendant's right of way and thereby set fire to and burnt plaintiff's property, they must find for the plaintiff.

Same—Right of Action—Title to Lands.—In an action to recover damages for injuries to land caused by fire, the evidence showed that plaintiff's hus-

band bought the land and received a deed therefor, that part of the purchase money was paid before her husband's death, and the balance by her afterwards; that by the husband's will duly probated, whatever title he had passed to her, and that she or her husband had been in the exclusive possession and control of the land for about eleven years. *Held*, that the evidence, if un rebutted, was sufficient to establish the plaintiff's right to maintain the action.

APPEAL from District Court, Tarrant County.

Templeton & Carter for appellant.

Harris & Harris for appellee.

STAYTON, C. J.—Plaintiff brought this action to recover damages, which she alleged she had become entitled to by reason of the fact that fire had been communicated to her land through negligence in the management

Case stated.

of appellant's cars, and right of way, which ran through her land. She claimed that the fire destroyed grass of the value of \$650; fence of the value of \$200; and that the injury to the land by burning the turf and grass-roots amounted to \$375. The averments in reference to the grass, in so far as now necessary to state, were "that said 130 acres so burned off was, at the time, covered with a fine coat of grass, of luxuriant growth, which she had reserved for the wintering of her stock, and which she had begun to use for that purpose only a short time prior to the said burning; that said grass was very valuable, to-wit, of the value of five dollars per acre; and that by reason of the loss and destruction of the same by fire she was deprived of her only winter feed for her stock; that she sustained damage by reason of the loss of said grass in the sum of \$650."

The court instructed the jury that in estimating the damages to which plaintiff might be entitled they would look to the market value of the grass destroyed at the time and place where it was, and that they might consider the market value for pasturage or hay purposes; there being much evidence as to the value for either purpose. It is urged that it was error so to charge, and the ground of the objection, we understand to have been, that there was no averment as to the particular manner in which the plaintiff desired to use the grass. Such an averment was not necessary. The grass belonged to the plaintiff, and if entitled to recover at all, she was entitled to the market value of the grass as it stood, to be ascertained by its value for any legitimate use. Many witnesses had testified to its value if it be used for pasturage, as had many if it was to be used to make hay; but they all had reference to the value of the grass as it stood at the time it was destroyed.

Damages for destruction of grass.

It is urged that the court erred in the following paragraph

of the charge: "If you should think that the defendant is liable to the plaintiff for the burning of her grass under the foregoing instructions, and should also believe that the turf or sod of said grass was injured by the burning of said grass, you should find for the plaintiff; also, the amount of damages or injury done by the injury of said sod or turf; and, in estimating this damage, you should be governed by the difference of the value in the plaintiff's land immediately before and immediately after the injury, if any, done to such turf or sod." The proposition under the assignment which raises this objection is that, "there being no allegation in the petition to admit proof of injury to the land, and no proof, were there such an allegation in the petition, that it was depreciated in value, the charge should not have been given." The substance of the allegation was that there was a good turf, well and thickly set; that the fire parched the turf, roots, and sod of the grass on the land so as to greatly injure and damage the same; that on account of the injury to the turf it will be three or four years before the turf will become as productive as it was before the fire; that by reason of burning the turf the plaintiff had been damaged \$375.

We understand the averment of the petition, in effect, to be that the mass of roots to the native grass growing on the land, without sowing or cultivation, which, with the surface earth with which commingled constitutes the turf, sward, or sod, were so injured by the fire as to make the land less productive of grass than it otherwise would have been in the future. The averment was one, in effect, that the land was injured, and the charge as correctly informed the jury what the true measure of damages was as would a charge directing the jury to assess the damages at such sum as would compensate the plaintiff for such injury as resulted from the burning of the turf or sod. The turf or sod was a part of the land, and an injury to it was an injury to the land which could be as well measured by the difference in the value of the land before the burn and afterwards as by an injury as to the sum which would compensate the plaintiff for any injury to the turf or sod. The measure is the same, whether expressed in the one way or the other. Such an injury is one in its nature permanent, though it may not be perpetual, and differs from an injury to a growing crop, which does not result in any injury to the land as distinguished from the crop. It seems to be urged, as the destruction or injury of the turf would have rendered it less difficult to have placed the land in cultivation than it otherwise would have been, and for this reason the owner was not injured at all. It is not the right of one,

through whose wrongful act an injury has been done to the land of another, to have the measure of damages fixed by the effect the injurious act may have on the land if used for some purpose other than that to which it was applied or desired to be applied by its owner; but it is the right of the owner to have his damages measured by the extent of the injury to the land used for any lawful purpose to which he had appropriated it, desired to appropriate it, or to which it is adapted. *Fort Worth & D. C. R. Co. v. Hogsett*, 67 Tex. 687. It does not rest with the wrong-doer to say to the owner: Use your land for a purpose for which you do not desire to use it, and it will be as valuable to you for that use as it was before for another.

It is urged that the court erred in instructing the jury as follows: "If you believe from the evidence that the engines of the defendant emitted sparks that set fire to the grass, if any, that may have accumulated on defendant's right of way adjacent to plaintiff's property, and thereby set fire to and burned any grass or fence of plaintiff, on her said property, you will find for the plaintiff." The defendant was not liable unless the fire had its origin in its negligence, and, had there been any evidence tending to show such care on its part as the nature of its business makes necessary, it would be necessary to reverse the judgment because of this charge, which, in terms, made the defendant liable whether it used due care or not. There however, was no evidence whatever tending to show that appellant used appliances such as are usual and necessary to prevent, as far as may be, the escape of fire from the engine, nor tending to show that its right of way was kept free from inflammable material. On the other hand, there was evidence which the jury must have believed reasonably sufficient to show that the burn was caused by fire that escaped from the engine, and that inflammable matter was permitted to accumulate on the right of way. Under this state of facts appellee was entitled to a judgment, and had the jury, under a proper charge, found that the fire originated in the manner stated in the charge, but that appellant was not liable, because not negligent, it would have been the duty of the court to set aside the verdict. *Galveston, H. & S. A. R. Co. v. Horne*, 69 Tex. 648, 35 Am. & Eng. R. Cas. 238; *Gulf, C. & S. F. R. Co. v. Witte*, 4 S. W. Rep. 492. While the charge did not correctly state the law, the jury found that the fire originated in such manner as to fix liability on appellant; and, in the absence of some evidence tending to rebut the *prima facie* case made by the evidence and affirmed by the verdict, no injury resulted from the failure of the court correctly to instruct the jury.

Negligence—
Accumulation
of combustible
material.

The verdict seems to us large, but there was ample evidence to sustain it; and, having been approved by the court below, it cannot be set aside by this court on the ground that it is excessive.

It is now contended that the evidence of title in the appellee was insufficient. The evidence shows that the husband

**Title of
plaintiff.**

of appellee bought the land and received a deed therefor in 1877; that part of the purchase money was paid before the husband's death, and the balance by appellee since; that by the will of the husband, duly probated, whatever title he had passed to her; and that she and her husband had been in the exclusive possession and control of the land for about 11 years. Such evidence, in the absence of some rebutting evidence, was sufficient to maintain this action; and it is not important, in view of the uncontroverted facts, that the court did not submit an issue as to title. If appellant desired such an issue to be submitted, it should have asked a charge presenting it. There is no error in the judgment, and it will be affirmed.

Fires—Measure of Damages.—If property has negligently been destroyed by fire, the measure of damages is the value of the property at the time and place of destruction; *Parrott v. Housatonic R. Co.*, 47 Conn. 575; *Burke v. Louisville & N. R. Co.* 7 Heisk. (Tenn.) 451; *Chapman v. Chicago & N. W. R. Co.*, 26 Wis. 295; and the company is not entitled to have the recovery limited to the cost of replacing the property. *Burke v. Louisville & N. R. Co.*, 7 Heisk. (Tenn.), 451. But it is not necessary that there should be an actual market value for an article in order to entitle the owner to recover for its destruction. *Atchison, T. & S. F. R. Co. v. Stamford*, 12 Kan. 354, 380. In an action to recover damages for the destruction of buildings, evidence as to the cost of new buildings to replace those destroyed, is admissible as furnishing data for the approximate estimate of the value of the old buildings. *Cleland v. Thornton*, 43 Cal. 437.

When the property has only been injured, the measure of damages is the difference between the value before the injury occurred and the value after the injury at the place where it was damaged; and if the property in its damaged condition could find no market at the place of injury, the expenses reasonably necessary to prepare it for sale in a market and shipment thereto, may be recovered. *Texas & P. R. Co. v. Levi* (Tex.), 13 Am. & Eng. R. Cas. 464.

It is only however, when the damage to land is permanent that the difference in its value before and after the fire, forms the measure of recovery. *Galveston, H. & S. A. R. Co. v. Horne* (Tex.), 35 Am. & Eng. R. Cas. 238, 242. The rule is, that if the thing destroyed although it is a part of the realty, has a value which can be accurately measured and ascertained without reference to the soil on which it stands, or out of which it grows, the recovery must be for the value of the thing destroyed, and not for the difference between the value of the land before and after such destruction. *Whitbeck v. New York Cent. R. Co.*, 36 Barb. (N. Y.), 644. Accordingly, in an action to recover damages for the destruction of fruit trees, the plaintiff is entitled to judgment for the value of the trees as they stood upon the land at the time of the fire, and not merely to recover the diminished value of the land since the destruction. *Whitbeck v. New York Cent. R. Co.*, 36

Barb. (N. Y.), 644; *Norfolk & W. R. Co. v. Bohannon* (Va.), 7 S. E. Rep. 236. In *Argotsinger v. Vines*, 82 N. Y. 308, 313, *Whitbeck v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 644, was distinguished and it was pointed out that that case differed from one where trees were usually converted into timber or firewood, and are sold as they stand for that purpose, or nursery trees which are grown for market, and that it was not decided that, where the land is injured by the destruction or injuring of trees, this might not be taken into consideration in determining the question of damages. In an action to recover damages for the destruction of an orchard of fruit trees, the jury cannot consider the cost of replanting trees, the first proper season for planting after the burning, and the value of the care and labor expended on the trees before burning, with interest thereon from the time it was expended. *Norfolk & W. R. Co. v. Bohannon* (Wis.), 7 S. E. Rep. 236. But in estimating the damage to the land burned over by fire, the witnesses may take into consideration timber standing upon the land, and may state their opinions as to the value of such timber. *Stertz v. Stewart*, (Wis.), 42 N. W. Rep. 214.

Where forest trees have been injured but not destroyed by fire, the measure of damages is the difference between the value of the trees before the fire and their value after the fire. *Atkinson v. Atlantic & P. R. Co.* 63 Mo. 367.

In an action to recover damages for the burning of growing grass, plaintiff's recovery is measured by the value of the grass at the place at which it was growing; *Galveston, H. & S. A. R. Co. v. Horne* (Tex.), 35 Am. & Eng. R. Cas. 238; and where the burning has resulted in injury to the grass roots whereby the ground is rendered less productive of grass than it would have been had the fire not occurred, the owner is entitled in addition to recover the difference between the value of the land immediately before the injury and its value immediately after. *Fort Worth & D. C. R. Co. v. Hogsett*, 67 Tex. 687; *Missouri Pac. R. Co. v. Ayers* (Tex.), 8 S. W. Rep. 538. In *Vermilya v. Chicago, M. & St. P. R. Co.* (Iowa), 23 Am. & Eng. R. Cas. 108, the court held that where a meadow is destroyed by fire, the owner is entitled to recover as damages the cost of restoring it to as good a condition as it was before the fire. This decision was founded upon the reasoning that the value of the meadow is largely based upon the fact that it is in the nature of a permanent improvement and is not to be planted each year. The owner therefore could not be fully compensated for his loss unless allowed for the value of the meadow, and it was declared that no more just or reasonable way of determining that value could be suggested than by inquiring as to the cost of restoring it. In *Pittsburg, C. & St. L. R. Co. v. Hixon* (Ind.), 32 Am. & Eng. R. Cas. 374, the court followed a similar rule, and held that evidence of the cost of reseeded a meadow, and of its rental value during the time it could not produce proper grass, was admissible.

Same—Interest on Damages.—In Missouri, it has been held that as the statutes relative to railroad fires contain no provision concerning interest, and the statute concerning damages which allows interest in cases of unlawful conversion by the party sued, does not, in terms or by analagous reasoning, embrace a case where no possible benefit could have accrued to the party causing the destruction, no interest is recoverable upon the damages. *Kenney v. Hannibal & St. J. R. Co.*, 63 Mo. 98; *Atkinson v. Atlantic & P. R. Co.*, 63 Mo. 367; *De Steiger v. Hannibal & St. J. R. Co.* (Mo.), 7 Am. & Eng. R. Cas. 492. But the majority of the cases appear to adopt a contrary view, and hold that interest is recoverable, not indeed as interest, but as part of the damages. *Parrott v. Housatonic R. Co.*, 47 Conn. 575; *Wilson v. Atlanta & C. A. R. Co.*, 16 S. Car. 587; *Galveston, H. & S. A. R. Co. v. Horne* (Tex.), 35 Am. & Eng. R. Cas. 238, 242; *Chapman v. Chicago & N. W. R. Co.*, 26 Wis. 295, 304.

MCCLAIN.

v.

BROOKLYN CITY R. CO.

(New York Court of Appeals, Second Division, November 26, 1889.)

Street Railway—Injuries to Foot Traveller—Negligence of Driver.—In an action to recover damages for injuries sustained through being run over by a horse car, if there is evidence tending to prove that the car driver saw the plaintiff on the track in advance of the team and had the opportunity to observe the danger in which the rapid progress of the horses might place him, and yet made no effort to slacken their movements or deviate their course so as to avoid the collision, but on the contrary, the speed was accelerated as they approached the plaintiff, there is sufficient evidence to sustain a finding that the car driver was guilty of negligence.

Same—Contributory Negligence—Province of Jury.—Plaintiff was run over by a street car while crossing a track. He was somewhat familiar with the situation in that locality and knew that a great many cars passed at that place. He testified that he looked both ways along the track, and saw a car standing at some distance away; that he then started to cross the track and was knocked down. The car which caused the accident came out of a depot switch on a curve and entered on the track close to the place where plaintiff was injured. If he had looked back upon the switch track, he could have seen the car coming. Just as the car reached the track, the speed of the horses was accelerated and there was evidence tending to show that but for the increased speed, plaintiff would have escaped. *Held*, that it could not be said as matter of law that plaintiff was guilty of contributory negligence, but that the question was one for the jury.

Personal Injuries—Opinion Evidence as to Consequences.—In an action for damages for personal injuries, physicians who attended the plaintiff and who found their testimony upon personal examination and observation of his condition, may competently testify that the injury received was the cause of plaintiff's condition, and that certain consequences would follow in relation to his physical health and condition as the result of the injury as indicated by such condition.

Same—Opinion Evidence—Hypothetical Question.—A physician may in answer to a hypothetical question, state that in his judgment the tremor and impairment of the nervous system with which the plaintiff is afflicted, are due to the injury for which the action is brought.

Street Railway—Manner of Running Cars.—Instruction.—An instruction in an action against a street car company that "the defendant had no right to so occupy the street and use the same with its cars so as to make it extremely dangerous to cross the street at all times," has relation to the manner of performing the car service on a street, and, fairly construed, does not mean that the defendant had no right to run so many cars as it did there.

Same—Contributory Negligence—Error of Judgment.—In an action for

personal injuries, an instruction that "a mere error of judgment does not necessarily amount to carelessness if the plaintiff took reasonable care, and then made a mistake as to the safest course to pursue in crossing the street, he is not guilty of negligence for that reason," is not erroneous.

Same—Right of Traveller to Cross Street—Instructions.—An instruction that "no matter how many cars were in the street or where the point was, the plaintiff had a right to select any point to go across, but he was bound to exercise care commensurable with the circumstances of the case," only imports that the plaintiff's right to cross the street was no less at one than at another point, and that it was for him to determine where he would seek to exercise the right to do so, and is not erroneous as justifying the inference that the plaintiff was at liberty to encounter apparent danger, or that his right upon the street was superior to that of the defendant in the operation of its cars.

APPEAL from General Term of the Supreme Court, Second Department.

Action for damages. Defendant appeals from the decision of the general term affirming a judgment for the plaintiff.

Samuel D. Morris for appellant.

Charles J. Patterson for respondent.

BRADLEY, J.—The action was brought to recover for personal injuries of the plaintiff alleged to have been occasioned solely by the negligence of the defendant. On January 24, 1885, when the plaintiff with a small boy in his arms, was proceeding to cross Fulton street, in the city of Brooklyn, on foot, he was overtaken and knocked down by a team of horses drawing one of the defendant's street-cars. This occurred between 5 and 6 o'clock in the afternoon, when the cars there were closely following each other, and thus materially interrupting passage across the street. The plaintiff after waiting several minutes on the east side of Fulton street for an opportunity to cross over it, stepped behind and close to a car on its way out of what was known as the "Bridge Depot Switch" into and southerly up Fulton street, and followed it closely until the car reached the latter street and partially halted, and then the plaintiff started to go across to the west side of the street. He nearly reached the outer rail of the up track, when he was run against by the off-side horse of the team of a car which came out of the switch on another track into Fulton street, a short distance back, northerly of the place where the car which the plaintiff followed entered it, and was proceeding in the same direction.

While the defendant had the right to run its cars upon the street, its duty was to use reasonable care, so as to do no unnecessary injury to persons traveling upon it.

Whether the defendant was on this occasion chargeable with negligence was a question of fact properly submitted to the jury. There was evidence tending to

Facts.

Negligence of car-driver.

prove that the defendant's driver of the horses attached to the approaching car saw the plaintiff on the track in advance of the team, and had the opportunity to observe the danger in which the rapid progress of the horses might place him, and yet made no effort to slack their movement or deviate their course so as to avoid the collision, although the plaintiff was at or near the outer rail at the time it occurred, but that on the contrary, the speed of the horses was accelerated very considerably as they approached him. The circumstances, as represented by the evidence on the part of the plaintiff, warranted the conclusion that, by the exercise of the reasonable care which it was the duty of the defendant's driver to observe, the injury would have been avoided.

But this fault on the part of the defendant did not charge it with liability, unless the plaintiff was free from negligence contributing to the calamity. This was a close and

**Plaintiff's
contributory
negligence.**

the more difficult question upon the evidence. The plaintiff was somewhat familiar with the situation in that locality, and knew something of the extent of street-car service there. He was therefore able to appreciate the necessity of careful observation in going upon the street to keep out of the way of moving cars, and to see that his course was clear. For that purpose it was incumbent on him to use due care. His precautionary duty in that respect for his protection may not have been so great as that imposed upon one crossing a steam-car railroad, because a train on the latter is not subject to control, as is, to some extent, the team drawing a street-car. But, as a street car must continue on the rails of its track, persons otherwise traveling on the street are required to use care to keep out of its way; yet for their protection the duty rests upon the driver to keep his horses reasonably within his control upon the public streets. *Adolph v. Central Park, N. & E. R. Co.*, 79 N. Y. 530; *Moebus v. Herrmann*, 108 N. Y. 349. If by the exercise of reasonable care the plaintiff could have seen the approaching car, and ought to have apprehended the danger of the situation, he was chargeable with negligence, for he was not at liberty to take even doubtful chances of the consequences of crossing the track in the face of danger, or in reliance upon the successful attempt of the driver to slack the speed of the horses. *Barker v. Savage*, 45 N. Y. 191; *Belton v. Baxter*, 54 N. Y. 245; *Davenport v. Brooklyn City R. Co.*, 100 N. Y. 632.

The contention on the part of the defense that, if he had looked in the direction from which it was coming, the plaintiff would have seen the approaching car, had the support of evidence, and upon that fact is based the charge that he

was negligent. The plaintiff says that, when the car which he followed slacked up, he looked both ways on the Fulton street track, and saw a car drawn by three horses, headed southerly upon the track which he attempted to cross; that it had come almost to a stand-still 12 or 15 feet from where he was; that he then started to go across the track, and was knocked down, as before stated. It seems that the car drawn by the horses which came in collision with him came out of the bridge depot switch on a curve from the northeast, and entered upon the Fulton street track in front of the three-horse car before mentioned, so as to drop in behind the car the plaintiff had been following. He also testified that he did not see the car or horses by which he was struck down, and did not know where it came from. If, when he started from behind the car to cross, he had looked back upon the switch track by which the approaching car entered that on Fulton street, the plaintiff may have seen the car coming. But, seeing the car halting but a short distance from him, he may have been led to suppose that there was no danger from any other source in that direction, and therefore he failed to observe the car coming on the intermediate entering switch, the junction of which with the main track, evidently, was near the place from which he then started to cross the track. That situation, in view of the expeditious movement required by him to get across the track, furnished some excuse to the plaintiff for not making a more searching observation than he says he did make before starting to cross over to the west side of the street. The distance at that time of the horses of that car from him must have been short, as he was struck before he was able to completely cross the track on which they came up behind and to him. But the fact that the horses were struck, as the evidence tends to prove they were, by the defendant's trackman, and by the driver, when they were proceeding on the curve in to the main track, and thus put into rapid movement, lessening the time of their approach to the plaintiff, and for his opportunity to escape by crossing in advance of them. The situation, as represented by one of the plaintiff's witnesses, was that when the plaintiff "got to the track nearest the sidewalk the car that struck him came out of the second switch on the up track." "The right-hand horse was on a run,—he went faster after the man hit him" with the iron. The witness thought the driver struck the horse, and added that the horse which came against the plaintiff was on a run. It may have been inferred from the evidence that, but for the increased movement given to the horses, the plaintiff would have escaped the injury. The conclusion was therefore permitted that, when the plaintiff

started to cross the track, the horses were on the switch, and not within his observation when and as he looked down the main track, which he proceeded to cross, and that it was by the accelerated speed that they were enabled to get upon that track and overtake him before he passed the outer rail. It may also be observed that the continued succession in the movement of cars upon the track, and other vehicles upon the street, may have been such that it did not seem to him prudent on his way across to stop and deliberately look in all directions, or to turn around to see whether anything was approaching in the rear. It cannot as matter of law be held that he was less alert, under the circumstances, than he was required to be. There was some conflict of evidence on the subject, but, in view of that the most favorable to him, it was such as to present a question of fact, and warrant the finding that the plaintiff was not chargeable with negligence contributing to the injury. Whether or not, with less interruption and greater safety, the plaintiff could have crossed the street at some other point, or in some other way have gone to his place of destination, so far as it had any bearing upon the question of its negligence, was disposed of by the verdict of the jury. He was required, for safety, to act upon his judgment, and to use due care to escape danger. And to support, upon this review, the ruling of the trial court upon the motion for non-suit, it is sufficient that the evidence warranted the submission of the case to the jury, which it clearly did.

The defendant's counsel took exception to the reception of opinions of medical witnesses. The physicians attended the plaintiff, and their evidence was founded upon personal examination and observation of his condition, which they described. It is argued that the evidence was speculative in character, and to support the objection that it was incompetent the case of *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y. 305, 19 Am. & Eng. R. Cas. 167, is cited as authority, where it was held that opinions of what might follow or develop from personal injuries are merely speculative as to the consequences, and lack the requisite element of reasonable certainty to render them admissible as evidence. The statement of the possibility of future consequences of an injury, as there properly held, does not necessarily furnish any evidence of what will follow. It is mere speculation as to what may be the future condition of the patient, resulting from an injury, and does not represent the judgment of the expert as to what will be its effect. That case is not in conflict with the earlier ones holding that evidence of the probable results of an injury was competent. *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. N. Y. 425; *Filer*

Evidence as to
consequences
of accident.

v. New York Cent. R. Co., 48 N. Y. 42. The evidence of that character is dependent upon the opinions of medical experts. It may not be and ordinarily is not susceptible of absolute certainty. And their judgment of the probable consequences comes within the rule of reasonable certainty, and therefore of admissibility. *Turner v. City of Newburg*, 109 N. Y. 301, 309; *Griswold v. New York Cent. & H. R. R. Co.*, 44 Hun, N. Y. 239, affirmed 115 N. Y. 61. There was no error in the reception of the evidence referred to in the present case. It was given as the judgment of the witnesses that the injury was the cause of the condition of the plaintiff, and that certain consequences would follow in relation to his physical health and condition as the result of an injury, then indicated by such condition.

And the same may be said of the exception taken to reception of the answer of the doctor to the hypothetical question. Upon the state of facts assumed by the inquiry, it was competent for the witness to state that in his judgment the tremor and the impairment of the nervous system, with which the plaintiff was afflicted, were due to the injury. The facts upon which the question was based practically excluded all causes up to the time of the accident, and therefore the evidence called for was not speculative. It was offered to show, not merely that the injury might produce the condition or that such a result was likely to follow, but that, in view of such facts, it did cause such condition.

Opinion evidence—Hypothetical question.

The further questions arise upon exceptions taken to the charge, and to the refusals to charge as requested. The charge made upon the plaintiff's request, that "the defendant had no right to so occupy the street, and use the same with its cars, so as to make it extremely dangerous to cross the street at all times," had relation to the manner of performing the car service on the street, and, as fairly construed, did not mean that the defendant had no right to run so many cars as it did there. While interruptions in crossing it may be necessarily incident to its use in running cars, there is no such exclusive right for that purpose as to render the use of it for the purposes of travel across it so dangerous as to practically preclude such use. This was the fair import of the charge, and the exception to it was not well taken.

Manner of performing car service

The court also charged that "a mere error of judgment does not necessarily amount to carelessness. If the plaintiff took reasonable care, and then made a mistake as to the safest course to pursue in crossing the street, he is not guilty of contributory negligence for that reason." An exception

was taken. While acting on error in judgment under some circumstances may constitute negligence, such is not the necessary consequences of it, under all circumstances. And as applied to this case the charge, as made, was not error, although the question, so far as related to the conduct of the plaintiff, was mainly one involving that of reasonable care on his part.

**Error of
judgment.**

In the course of the charge to the jury the court said: "It was a public street and he (plaintiff) had a right to go where he chose; he was to be the judge of that himself;" to which exception was taken. And the court further charged: "No matter how many cars were in the street, or where the point was, this old

**Right of
traveler to
cross street.**

gentleman (plaintiff) had a right to select any point to go across, but he was bound to exercise care commensurable with the circumstances of the case." An exception was taken to the statement that the plaintiff had a right to select any point to go across. It cannot be assumed that the court intended to have the jury understand that the plaintiff was at liberty, without prejudice, to encounter apparent danger, or that his right upon the street was superior to that of the defendant in the operation of its cars, but that his right to cross the street was no less at one than at another point, and that it was for him to determine where he would seek to exercise the right to do so. The responsibility, as the court charged, to exercise due care rested upon him. That care is as essential in the outset of the attempt of a person to cross as in the act of crossing, but the exercise of such right must be dependent upon his judgment, and the care essential to the proper exercise of it involves also the consideration of the rights of others, whose duties in that respect on the street are relatively the same. *Moebus v. Herrmann*, 108 N. Y. 349. There was no error in this charge.

The further exception to the charge, and to the refusal to charge as requested, involve only the consideration of the questions of the plaintiff's negligence founded upon his failure to look and see the approaching car horses by which he was injured. This subject has already had some attention. It was his duty to look in all the directions from which he had any reason to apprehend danger or liability to exposure to hazard of injury. He evidently did not apprehend the approach of the horses behind him. It does not appear that his attention had been called to the switch on which they came. He says he did not know how those tracks were situated; that he never took notice of them. The situation which may have given to him the appearance of safety has been before referred to. It can

**Duty to look
for approach-
ing cars.**

not, under the circumstances, as matter of law, be said that he was bound to look down upon the switch from which the car came onto the main track that he was proceeding to cross, although whether he did all that was required of him in looking—whether, in view of the situation, he did all, in that respect, essential to reasonable care and due caution on his part—was a question of fact for the jury. After an injury has occurred, it is not unfrequent that it may be seen how it could have been avoided. But contributory negligence is not always chargeable upon the failure to exercise the greatest prudence or the best judgment in cases where a person is required to act suddenly or in emergency. No other exception seems to require consideration. The judgment should be affirmed. All concur, except BROWN, J., not sitting.

Duty of Street Car Company to Avoid Injury to Vehicles and Pedestrians.—See note, 19 Am. & Eng. R. Cas. 127.

Relative Rights of Street Car Company and Public to Use of Track.—See note, 19 Am. & Eng. R. Cas. 127.

Competency of Opinion Evidence as to Consequences of Injury.—See New York, L. E. & W. R. Co. v. Strohm, (N. Y.), 19 Am. & Eng. R. Cas. 167; note, 169; Johnson v. Central Vt. R. Co. (Vt.), 19, *Id.* 169; Hubbard v. Grand Rapids, etc., R. Co. (Mich.), 18 *Id.* 336; Louisville, N. A. & C. R. Co. v. Falvey (Ind.), 23 *Id.* 522; Louisville N. A. & C. R. Co. v. Wright (Ind.), 33 *Id.* 370.

WINTERS

v.

KANSAS CITY CABLE R. CO.

• (*Missouri Supreme Court, December 21, 1889.*)

Cable Railway—Personal Injuries—Evidence of Negligence.—The gripman of a cable car testified that upon approaching a curve at the intersection of two streets he saw a child upon the sidewalk, and that he looked out and noticed that the track was clear and went on. There was other evidence to the effect that the child toddled along for a distance of at least 35 feet on the street, and in the direction of the approaching car after the gripman saw him on the sidewalk, and it appeared that if the gripman had kept a diligent lookout he would have discovered the child in time to prevent the injury. *Held*, that the evidence was sufficient to sustain a judgment against the company.

Same—Ownership of Car and Operation of Railroad—Admission in Pleading.—In an action by a child to recover damages for injuries caused by a cable car, the defendant pleaded that plaintiff's mother contributed to the injury by placing him in charge of a careless person who allowed him "to get in front of defendant's car." *Held*, that such plea admitted the ownership of the car and operation of the road by the defendant, and it could not object that the plaintiff had failed to prove either point.

Contributory Negligence—Infant—Imputed Negligence of Parent.—In an action by a child to recover damages for personal injuries, the negligence of his parent in allowing him to go into a place of danger constitutes no defense.

Same—Negligence of Person in Charge of Child.—When suit is brought by a child not *sui juris*, the negligence of another child in whose charge he was, in allowing him to go in front of a passing car, does not affect the plaintiff's right of action.

APPEAL from Circuit Court, Jackson County.

Action by William Winters, an infant, by his next friend, against the Kansas City Cable R. Co. to recover damages for personal injuries. The jury returned a verdict for the plaintiff upon which judgment was entered, and defendant appeals.

Johnson & Lucas for appellant.

Jewell & Thompson for respondent.

BLACK, J.—One of the defendant's cable-cars ran upon the plaintiff, a boy three years of age, at the crossing of Ninth street and Grand avenue, in the city of Kansas, crushing one of his legs so that amputation became necessary. Hence this suit by his next friend for damages.

The refusal of the court to give defendant's instruction, in the nature of a demurrer to the evidence, makes it necessary

Facts. to set out the substance of the evidence on the one side and the other. Ninth street runs east and west, and Grand avenue north and south. The train of cars was going east on Ninth street, and thence around the curve, at the crossing of the two streets, and north on Grand avenue. The accident occurred just as the front or grip car passed around and cleared the curve. The car, in approaching the curve, ascended a grade, but the surface of the streets at the crossing could be seen by the gripman for 100 or more feet before he reached it. There were no obstructions on the streets. The grip-car was open at both ends, but closed at the sides for a space of about two feet from the floor, and above that there were glass windows. The gripman's position placed him in the middle of the car. The boy and his sister, 10 years of age, went to a building, about a block distant from the crossing, by permission of their mother, to gather kindling wood. She lived close to the same place, and says

she let them go because she was not able to buy kindling. The children crossed over the tracks from the south to the north side of Ninth street, and thence went east on the sidewalk to Grand avenue, and thence eastward across that street towards their home. The car ran against the boy at a point about 35 or 37 feet east of the west curb of Grand avenue. Of two witnesses, who were nearly a block distant, one of them testified: "When I first saw the boy he was three or four feet from the lamp-post at the northwest corner of the streets. He ran straight from that point until the car hit him. It did not seem to last longer than the snap of the finger." The other witness says: "The boy was trying to cross the street. There was a little girl ahead of him. The last I saw of her she was going." Mr. Vincent, who was 20 or 30 feet distant, says he first saw the boy when near the west track; that he heard some one having a child's voice call, but did not see the little girl until after the car struck the boy. This witness, and another person who was in the car, and saw the boy when within two feet of the car, say he was toddling along, about as a boy of his age would move. Other evidence shows that the gripman was looking to the front; that his attention was called to the presence of the boy, but too late to enable him to stop the car in time to avoid the injury. Mr. Davis testified for the defendant: "I was on the north side of the grip-car, about three seats from the front. I saw the girl and boy starting over the crossing. Just as we swung up on top of the hill the girl stopped, and turned her head and looked at us. As the grip-car came around the curve, she ran back screaming, and threw up her hands, leaving the child by himself. He went in front of the train. At the time the girl turned and ran back she was three or four feet from the track. The gripman then had no time to stop the car. I first saw the child when about one step from the sidewalk. He had a pail or little bundle in his hand." The gripman testified: "I saw the child just as I was about to strike it. It was not more than a foot from the car. I stopped the car within about six feet after I saw the child." On cross-examination he says: "When I first saw the child it was at the lamp-post, on the sidewalk. There was a young lady close to him—a rod from him. Saw no children near the boy. I did not see any little girl. I just looked out and noticed everything was clear, and went on. I did not look any more. The first I knew the child got across, and was struck. *Question.* These grip-cars have closed windows all around? *Answer.* Yes, sir. *Q.* Standing at the grip, you could see this place, between the lamp-post and where the boy was hurt? *A.* Yes, sir. *Q.* If you had been looking? *A.*

You could see a part of the way there; you could see it all by stooping down."

If the defendant's liability in this case is limited to want of care on the part of its servants after they saw the boy in a dangerous situation, then the plaintiff failed to make out a *prima facie* case. The evidence is all to the effect that the gripman used all the means at his command to avoid the calamity, after he knew the boy was in danger. But the principle of law just stated does not control this case. The defendant is operating dangerous machinery, at a rapid speed, on and along the public streets of the city, and must know, and in law is bound to know, that men, women, and children have an equal right to the use of the highway, and will be upon it. It is the duty of the defendant's servants to be on the lookout, and to take all reasonable measures to avoid injuries to persons who may be upon the street. The duty to be on the watch is no more than ordinary care under such circumstances. The care to be used, to be ordinary care, must depend upon the surrounding circumstances. Now the evidence of the gripman tends to show that when he came to the crossing he rang his bell, looked out and saw the way was clear, and then went on around the curve, neither looking to the right nor left. There is other evidence to the effect that the boy toddled along for a distance of at least 35 feet on the street, and in the direction of the approaching car, after the gripman saw him on the sidewalk, and the car must have traveled a much greater distance. Other persons saw the boy and girl when they started across the street in front of the approaching car. Had the gripman cast an eye to the left when he reached the curve, or while passing it, he would doubtless have discovered these children in time to have avoided the injury. He says he stopped the train in a space of six feet after the grip-car had passed the curve, and, if that be so, then there is reason to believe that the evidence of another witness to the effect that it could have been stopped on the curve in a space of four feet is true. But, assuming that both estimates should be doubled to approach accuracy, still the jury might well have found, as they did, by their answers, to interrogatories, that the gripman could, by the exercise of ordinary care, have seen the plaintiff in time to have stopped the train before plaintiff was injured. It was admitted on the trial that this accident happened on one of the principal traveled streets in the city. If we say the jury should have been directed to find for defendant, then we must hold, as a matter of law, that it was sufficient care on the part of the gripman, when approaching the curve, to ring his bell, see that the track before him was clear,

and go ahead without thereafter looking to the right or left. This we are not prepared to do. The question of negligence in this case was one of fact, and our duty is performed when we see that there is sufficient evidence to support the verdict, so far as the demurrer to the evidence is concerned. If the child ran in front of the car, and the gripman was free from negligence, then there ought to be no recovery. This proposition was placed before the jury in very clear terms by an instruction, given at the request of the defendant, wherein it is said that before the plaintiff can recover he must prove that he was injured in direct consequence of the negligence or carelessness of the person in charge of the defendant's car.

Province of
Jury.

But it is said there is no evidence that the defendant was operating the road at the time of the accident, and that some of the instructions are bad because they assume that it was the defendant's car which ran over the plaintiff. No such question was mooted in the trial court. Besides, it may be inferred from the evidence of the brakeman and superintendent that defendant was operating the road. But, aside from all this, the answer says the plaintiff's mother contributed to the injury by placing him in charge of a careless person, who allowed plaintiff "to get in front of defendant's cars suddenly, while they were in motion, so that the injury suffered by plaintiff was inevitable." The ownership of the car and operation of the road by defendant are admitted facts in the case. We fail to discover any merit in either of these objections.

Ownership of
car—Operation
of road.

The court, at the request of the plaintiff, gave this instruction: "(3) The court instructs the jury, as a matter of law, that negligence on the part of the little girl who was with the child injured, or near him at the time of said injury, cannot affect the question of the right of plaintiff to recover in this case;" but refused to give the following instruction asked by the defendant: "(2) If the plaintiff's mother and natural guardian permitted plaintiff to go on or near the tracks of defendant, alone, or in charge of a careless or incompetent person, and the carelessness and incompetency of such person contributed directly to plaintiff's injury, then the finding will be for the defendant." *Hartfield v. Roper*, 21 Wend. 615, is cited to show that the court erred in its ruling on both of these instructions. The substance of the doctrine there asserted is that where a child of such tender years as not to possess the discretion to avoid danger is permitted by its parents or guardian to be in the public highway, the negligence of the parent or guardian will defeat a recovery in a suit by

Imputed negligence of
parent.

Authorities
examined.

the child. This doctrine has been followed in some of the states. It is sometimes placed on the ground that the parent is the agent of the child, and other cases place it on the ground of identity between the parent and child. It probably stands as well on no ground at all as it does on either of them. The whole doctrine has been severely criticised by some of our best text-writers and denied by many courts. This court more than 20 years ago repudiated the doctrine in the case of *Boland v. Missouri R. Co.*, 36 Mo. 485. Says WAGNER, J., for the court: "Whilst the decision in *Hatfield v. Roper* may be supported by the facts in the case as failing to show such negligence as would fix liability on the defendants, the reasoning of the learned judge on infantile responsibility is certainly harsh and repugnant to justice." The court then gives its adherence to the contrary doctrine, asserted in the leading case of *Robinson v. Cone*, 22 Vt. 213. This is a suit by the child itself, and the negligence of the mother, if any there was, in allowing it to go upon the public streets, unattended by a person of mature years, constitutes no defence whatever to this action. In support of this conclusion, and the former ruling of this court, it is sufficient to cite 1 *Shear. & R. Neg.* (4th Ed.) § 78; *Beach, Contrib. Neg.* § 43; *Erie City Pass. R. Co. v. Schuster*, 113 Pa. St. 412; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399. Even in the case of a suit by the parent, all the circumstances are to be taken into account; and if the parent took as much care of the child as reasonably prudent persons of the same class, and in the same situation in life, ordinarily do, then the parent is not to be held guilty of such negligence as will defeat his action. 1 *Shear. & R. Neg.* (4th Ed.) § 72; *O'Flaherty v. Union R. Co.*, 45 Mo. 70; *Frick v. St. Louis, K. C. & N. R. Co.*, 75 Mo. 542, 10 Am. & Eng. R. Cas. 776. The negligence of the parent to defeat his or her action must be the proximate cause of the injury. *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 483. Unless these principles of law are adhered to, the poor of the land will be deprived of all benefit of the public schools in our cities, which cannot be reached but by passing over and along the public highways. But no more need be said upon this subject, for this is not a suit by the parent or guardian.

Appellant contends that the court erred, under the modified doctrine stated in *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 672. There the little girl, eight years old, was in the actual presence of the father. She attempted to pass through a small aperture between two cars standing on a track, and at a place which was not a public crossing, and was injured by the cars coming together. It was held that the negligence of the father should be imputed to the child in a suit by the

child, inasmuch as the father was present, and pointed out the place for her to go through, and she was attempting to follow out his directions when injured. Of the cases there cited, that of *Holly v. Boston Gas-Light Co.*, 8 Gray (Mass.), 132, was one where the injury seems to have been caused from the negligent act of the father. In *Waite v. North Eastern R. Co.*, 96 E. C. L. 728, the child was in charge of its grandmother. The case of *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88, is a case where the boy, 10 years old, was traveling with his father. The case concedes that the negligence of the parent or guardian having charge of a child of tender years would not excuse the carrier from using all the means in its power to prevent the injury, but relieves the carrier from liability for the negligence of the parent when the parent's negligence is the proximate cause of the injury. "In that event," says the court, "it is not the negligence of the defendant, but of the party having the control of the child; and, if any liability attaches to either party, it must be to the latter." The girl in the present case was to some extent the protector of the little boy, but she was a child only herself, and it is both unreasonable and inhuman to say that she filled the position of a parent or guardian. It might as well be said of twin children, out of the sight of the mother, that each is the responsible guardian for the other. If the girl was to some extent negligent, that would not relieve the defendant from the exercise of due care. The *Stillson* case does not profess to disturb the former ruling of this court, and it is believed has never been so regarded. It is at most no more than an exception to a general rule, and must stand on its own peculiar circumstances, and is wholly inapplicable to the present case. The facts as in that case stated would indicate that the negligence of the father, and not of the defendant, was the proximate cause of the injury. The court, in a subsequent part of the opinion, after stating that the question of negligence was one for the jury, uses this language: "But there must be some evidence on which to base instructions to a jury. After a careful examination of the testimony in this case, aided by the maps in the record, we have been unable to conjecture in what respect it is claimed that there was negligence on the part of the defendant. There being no negligence on the part of the defendant, it was no more liable to an infant than an adult; so that, after all, the father's negligence was the proximate cause of the injury; and that case should be regarded as standing on this ground and no other."

It follows from what has been said that the court did not err in its ruling upon these two instructions. In other instructions asked by the defendant the jury were told, in clear

terms, that before they could find for plaintiff he must prove that he was injured in direct consequence of the negligence of the person in charge of defendant's car; that if the gripman was using ordinary care in looking out and attending to his business, but did not see the plaintiff in time to stop the car before running over him, then there was no negligence on his part; and that ordinary care means that degree of care which an ordinarily prudent and careful person would exercise under like circumstances. The plaintiff's instruction is in accord with those given for defendant, and no substantial objection is made to them. The judgment is therefore affirmed. All concur.

Injuries to Persons in Street by Street Railways.—See *Chicago City R. Co. v. Robinson*, (Ill.), 36 Am. & Eng. R. Cas. 66, note 68; *Brooks v. Lincoln St. R. Co.* (Neb.), 37 *Id.* 560.

Injuries to Infants—Doctrine of Imputed Negligence.—See *Chicago City R. Co. v. Robinson*, (Ill.), 36 Am. & Eng. R. Cas. 66, note 68.

Cable Railways—Negligence—Injuries to Persons in Street.—See *Chicago City R. Co. v. Robinson*, (Ill.), 36 Am. & Eng. R. Cas. 66.

SILBERSTEIN

v.

HOUSTON, WEST STREET & PAVONIA FERRY R. CO.

(*New York Court of Appeals, November 26, 1889.*)

Street Railway—Slippery Condition of Track—Evidence.—In an action to recover damages for injuries sustained by being run over while attempting to cross a street, evidence that it had not rained or snowed within two days of the date of accident, is inadmissible, even though the undisputed testimony shows that the place where the accident occurred was icy and slippery, the company being under no duty to keep the space between its tracks free from ice and snow.

APPEAL from General Term of the Supreme Court, First Department.

Action by Emanuel Silberstein by his guardian *ad litem*, to recover damages for personal injuries sustained by the plaintiff while crossing a street. Judgment for the plaintiff was rendered at special term and was affirmed by the general term. See 4 N. Y. Supp. 843. Defendant appeals from a judgment of affirmance.

Charles E. Miller for appellant.

Samuel Untermeyer for respondent.

PECKHAM, J.—The motion for a new trial on the ground of the contributory negligence of the plaintiff was, we think, properly denied. It was a case, upon the whole evidence on that point, for the jury. The defendant did not claim that no case for a jury had been made out upon the question of the defendant's negligence. This would lead to an affirmance of the judgment but for the admission of one piece of evidence, which we think was erroneously admitted, and may have done great harm upon the question of defendant's negligence. Case stated.

An officer of the weather bureau was called on the part of the plaintiff, and he had with him the official reports of such bureau, and which he swore were correct, and taken from observations made in the city of New York. Slippery condition of track—Evidence. The accident occurred on the 13th of February, 1887, and the witness was asked this question: "After looking at the reports, can you state when next preceding the 13th day of February, 1887, there was last a fall of rain or snow in the city of New York?" This was objected to generally by the defendant's counsel; no particular ground of objection being stated. Plaintiff's counsel then stated as follows: "We desire to show that it had not rained or snowed within two days, at least, of the 13th of February, and that there was still ice upon the stones between the rails of defendant's tracks at the point at which the boy slipped; and we desire to impute negligence to the defendant by reason of that condition of track." The objection was thereupon overruled, and an exception taken, and the evidence was admitted; the witness testifying that on February 11, 1887, it rained from 2:50 P. M. to 4:40 P. M., and that was the first rain preceding February 13th. He further stated that the condition of the atmosphere on that day after the rain, at 10 o'clock P. M., was 44, and that there was no fall of rain or snow from the time stated on the 11th of February up to 13th. At the time this evidence was admitted, it had appeared by undisputed proof that the streets were in some portions icy and slippery, and that the portion of the street in question at the place of the accident was in that condition. The purpose of the evidence on the part of the plaintiff's counsel was avowed, and that purpose was brought out as an answer to the objection of the defendant's counsel to the introduction of such evidence. It was to impute negligence to the defendant by reason of the condition of the tracks, or, in other words, because of the existence of ice between the rails in a public street of a city. The idea, seemingly, was that a duty rested upon the defendant to keep the space between its tracks free from ice and snow. Of course, no such duty rested upon it

and no such liability for a failure to do so as was claimed in this case would follow. It is now argued that if the evidence were admissible for any purpose, as there was simply a general objection to it, it was properly admitted, although plaintiff's counsel may have claimed its admission at the time upon improper grounds; and the case of *Parsons v. New York Cent. & H. R. R. Co.*, 113 N. Y. 355, is cited to sustain such contention. The two cases, we think, are not precisely similar; but, however that may be, the difficulty with this evidence is that it was not admissible for any purpose. It is claimed that it was competent for the plaintiff to prove the condition of the street between the rails at the time the boy fell upon the track, because that fact had a tendency to explain the reason of his fall. It may be assumed that it was thus competent, for the reason alleged. But the evidence proposed, and taken under objection, had no tendency whatever to prove such condition. That condition had already been proved, was uncontradicted, and was really not a point in issue in the case. It is difficult to see how the condition of the street at the point where the boy fell could be proved by evidence showing that there had been no storm for two days before that time. It was only pertinent when taken in connection with the other evidence as to what the condition of the street was, and in that way claiming to show neglect on the part of the defendant, in allowing the street to remain in that condition for such a length of time. We think this evidence could have been used, and judging from the record, very probably was used, before the jury with great effect upon the question of the defendant's liability. The charge is not given; and, judging only from the record as it appears before us, we cannot assume that the error in the admission of the evidence was cured by the charge. We think the judgment should be reversed, and a new trial granted; costs to abide event. All concur, except RUGER, C. J., and DANFORTH, J., dissenting.

Street Railway—Removal of Snow and Ice from Track.—See *Dixon v. Brooklyn City & N. R. Co.*, (N. Y.), 26 Am. & Eng. R. Cas. 203, note 207; *Bowen v. Detroit City St. R. Co.*, (Mich.), 19 *Id.* 131, note 136.

WORMSDORF

v.

DETROIT CITY R. CO.

(Michigan Supreme Court, June 28, 1889.)

Street Railway—Personal Injuries—Evidence as to Age of Car.—Where the plaintiff in an action to recover damages for injuries sustained in a collision between street cars, alleges a defect in one of the cars, it is error to admit testimony that it was a matter of general knowledge and rumor that the car in question had been on the road ever since it was built, such testimony being not only hearsay but also irrelevant to the issue, the obligation of the company being to furnish suitable cars and keep them in repair, whether old or new.

Same—Negligence—Evidence of General Reputation of Horse.—In an action for injuries sustained while travelling in a street car, plaintiff may prove the general reputation of a horse among the drivers and employes of the defendant for being an unsafe and unreliable horse to drive before a street car, as tending to prove that the defendant had notice of the unfitness of the animal for street car service.

Same—Evidence—Declarations of Driver.—The testimony of a witness that immediately after the accident he heard the driver of the car tell the company superintendent that he reported the car as having a bad break, has reference to a past transaction and is not admissible as part of the *res gesta*, nor for the purpose of charging the defendant with notice of the defect.

Negligence—Pleading—Separate Causes of Action.—Where a declaration alleges several acts of negligence, but neither alone is said to have caused the injury but the combined acts are alleged to have done so, it is error for the court to charge the jury that there are four grounds of recovery and that they might all stand or fall separately.

ERROR to Circuit Court, Wayne County.

Brennan & Donnelly and *S. T. Miller* for appellant.

Henry Orhus (*S. E. Engle*, of counsel,) for appellee.

CHAMPLIN, J.—This action was brought to recover damages arising from an injury to plaintiff while riding upon a street car. The negligence of the defendant was alleged to have consisted in neglecting to furnish proper and safe brakes and appliances for slackening the speed of cars in going down a grade, or for stopping the car, and in wrongfully and negligently furnishing and providing a braking apparatus with a weak, cracked, and defective connecting rod,

Facts.

which was utterly inadequate, unsafe, and positively dangerous to life and limb; that the rod was partly cracked and broken, and its situation and location under the car was open and exposed to view, and the defendant, by the exercise of ordinary care, could and would have known of the unsafe condition of said rod and braking apparatus, and did know thereof; and that in going over a bridge above the tracks of the Michigan Central Railroad, and descending the grade thereon westward, the said connecting rod broke asunder, rendering the front brake useless, so that the driver was powerless to check the speed of the car. In neglecting to provide the car with a conductor to apply the rear brake, and conduct and assist in the care of the passengers. In providing and furnishing as one of the teams a dangerous and fractious horse, which had for a long time before then been known to defendant to be dangerous, and at times unmanageable; and that the horses became frightened and unmanageable, and the cars rushed upon their heels, and they ran away. In the neglect of the driver of the car in which the plaintiff was a passenger, which was going east, to stop and permit her to alight, but wrongfully and negligently accelerated the "speed of his horses, so that the two cars came together with a crash. By means of the premises aforesaid, and the wrongful conduct and negligence of the defendant and its driver aforesaid, the plaintiff" was injured as stated in the declaration.

The declaration contains but one count, and the accident and resulting injury are alleged as having been caused by the several concurring negligent acts of and omissions of defendant. Had the connecting rod not broken, although the horse was fractious, and although there was no conductor, and although the driver of the east-bound car did accelerate his speed, and had not stopped and suffered the plaintiff to alight, the injury would not have been received by plaintiff. And so, if either duty upon the violation of which negligence is predicated had been performed, the accident would not have happened. It was necessary to the plaintiff's case under the pleadings to establish by proof each element of negligence alleged.

The testimony introduced by the plaintiff tended to show that Mr. Barry was superintendent of the road, and had general charge of the cars, horses, and men used and employed upon defendant's road, or at least of that portion of it upon which the accident happened. The defendant was in duty bound to furnish and provide suitable cars with proper and safe appliances for checking the speed of the cars on a descending grade, and for stopping them, as necessity or convenience required, and to keep the

Evidence as to
age of car.

same in good repair, and to provide safe horses for the transportation of passengers, and careful and prudent drivers. The defendant, however, is not liable as an insurer of the safety of its passengers, and is only liable for any injury which may happen through its own negligence or default, or the negligence or default of its servants. There is no principle of law which requires the defendant to furnish its road with new cars to transport passengers, or which makes them liable for using old ones. Whether new or old they are required to keep them in good repair, and fit for use, so as not to endanger the safety of passengers. Plaintiff's counsel was permitted to ask his witness this question: "*Question.* Was it a matter of general knowledge and rumor among the men that this car had been on the road ever since it was built?" The witness answered: "Yes, sir; that was all the talk about there. Men who were on ahead of me, that left the road before I went there, told me that this car was on just after the road started running." The court erred in admitting this testimony. It was not only hearsay, but entirely irrelevant to the issue.

It was shown that one of the horses which was attached to the car that collided with the one in which plaintiff was injured, known as "Gray Fannie," was a fractious and ungovernable horse, and required great care and skill at all times to handle. Knowledge of these facts was brought home to Mr. Barry, the superintendent of the company, which was sufficient to charge defendant with notice and knowledge of the unsafe disposition and habits of the animal, but in addition the plaintiff was permitted to show the general reputation of the horse "Gray Fannie" among the drivers and employes of defendant for being an unsafe and unreliable horse to drive before a street-car, and her propensity to run if anything came against her heels, as tending to prove that defendant had notice of the unfitness of the animal for street-car service, and retaining it therein after it had such notice or knowledge. The defendant claims that such testimony was merely hearsay, and inadmissible. The testimony was clearly admissible as tending to show the negligence of defendant in providing an unsafe horse, and using it after they knew or should have known its unfitness for the work. *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Hoyt v. Jeffers*, 30 Mich. 181; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; 17 Am. & Eng. R. Cas. 628.

The testimony tended to show that within a few minutes after the collision the superintendent, Mr. Barry, arrived at the place, and the court permitted a witness to testify that Mr. Barry asked the driver of the west-bound car what the

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General reputation of horse.

cause of the accident was, and the driver's reply that he thought it was because the brake-chain broke. **Declarations of driver.** This, perhaps, was admissible as part of the *res gestæ*, under our ruling in the case of Keyser v. Railway Co., 33 N. W. Rep. 870. But it was error to permit another witness to testify to a conversation which he claimed he heard between Mr. Barry and the driver immediately after the accident, as follows: "The driver told Mr. Barry that he reported the car to the barn, as having a bad break; that he reported the car to the barn before; that he didn't hear Barry say anything as to the cause of the accident." This narration of the driver was of a past transaction, and was no part of the *res gestæ*, and was inadmissible to bind the defendant with notice of the defect claimed.

Separate grounds of recovery. The court charged the jury that there were four grounds of recovery, and that they might all stand or fall separately, and that, if they had satisfied the jury that the accident was caused by the negligence of the defendant upon either of the grounds stated, although they had failed in respect to the other three grounds, the plaintiff was entitled to recover. We do not think the pleadings will support this portion of the charge. We do not think the pleadings will support this portion of the charge. The declaration alleges wherein the defendants were negligent, and then alleges that by means of the premises aforesaid, which premises were the concurring acts of negligence set out, the accident occurred. There are four several acts of negligence alleged, but neither, alone, is said to have caused the injury, but the combined acts are alleged to have done so. If the breaking of the connecting rod was purely accidental, and occurred without the fault or neglect of defendant, and the car rushed upon the horses upon the descending grade, and the defendant was not at fault in the team running away, I do not think the declaration is so drawn as to place the company in fault for the sole neglect of the driver of the west-bound car to stop and invite his passengers to alight. It would have to contain allegations of fact directly contrary to what is now charged. Thompson v. Railroad Co., 57 Mich. 300, 23 N. W. Rep. 820. The judgment must be reversed, and a new trial granted.

SHERWOOD, C. J., did not sit. The other justices concurred.

Street Railways—Evidence as to Use of Wild and Unmanageable Horses.—Dougherty v. Missouri R. Co. (Mo.), 34 Am. & Eng. R. Cas. 488.

SIOUX CITY STREET R. Co.

v.

SIOUX CITY *et al.*

(Iowa Supreme Court, October 9, 1889.)

Street Railway—Paving of Street—Impairing Obligation of Contract.—If, at the time of the incorporation of a street railroad company, it is provided by statute that the articles of incorporation shall at all times be subject to legislative control, and may be altered, abridged, or set aside by law, a city may, by ordinance, compel a street railway company to pave a space one foot in width on each side of its tracks, if, subsequent to the incorporation of the company, a statute has been enacted imposing upon street railway companies the duty of so paving the street, although the ordinance under which the company acquired the right to construct its tracks in the city streets only required it to pave the space between the rails.

APPEAL from District Court, Woodbury County.

Certiorari to determine the validity of an ordinance passed by the defendant city, requiring the plaintiff to pave a certain part of its streets. The court below sustained a demurrer to the petition, and the plaintiff having declined to plead further, entered judgment of dismissal. The plaintiff thereupon brought the present appeal. The report of the decision of the supreme court upon a former appeal will be found in 36 Am. & Eng. R. Cas. 143.

J. H. & C. M. Swan for appellant.

C. L. Wright and *S. J. Quincy* for appellees.

BECK, J.—1. After the decision of this cause when before in this court it was remanded for further proceedings in the district court. The petition was amended by the addition of allegations to the effect that the statutes Case stated. of the state, and the ordinance and other action of the city under which the pavement was constructed, and an assessment made therefor, are in conflict with article 1, § 10, pl. 1, of the constitution of the United States, in that they have the effect to impair the obligation of a contract. The claim of plaintiff in support of this allegation of its petition is based upon the position that the requirement to build the pavement in controversy, and the assessment therefor, is a burden additional to those imposed by the statute and ordinance under which plaintiff built its street railway, which are recited in our former opinion in this case. The ordinance of the city,

the plaintiff insists, was a contract under which plaintiff undertook to build the street railway upon the condition of paving between the rails, and doing other things which need not be specified. The paving outside of the track of the railway was not provided for by the ordinance, and is, therefore, a burden additional to those imposed by ordinance granting plaintiff authority to build its railway. It may be that the ordinance of the city requiring the paving in question does not affect the franchise of the plaintiff, as claimed by counsel. Possibly the term "franchise," when used in connection with corporations, is limited to designate the privilege and rights conferred by the charters, or the equivalent thereto under our statutes—their articles of incorporation. We need not here determine whether the assessment in question is in harmony or in conflict with what is called the "franchise" of plaintiff, and may assume that counsel's position, as to the effect that it pertains to a contract between plaintiff and the city, is correct, if it be found that such a contract exists, and is preserved unimpaired by the provision of the constitution of the United States above referred to.

It will be remembered, as is shown in our former opinion in this case, that plaintiff, a corporation organized under the laws of the state, with the object of constructing and operating street railways in Sioux City, was, by ordinance of the city, authorized to construct and operate a street railway upon certain streets of the city, on specified terms, among which was the requirement that the plaintiff should pave the space between the rails when the street upon which the railway is constructed is ordered to be paved. The plaintiff proceeded, under this authority, to build its street railway. Subsequently chap. 20, acts 1884, was enacted, which requires street railways, in cities of the class (the first) to which defendant belongs, to pave between the rails of their street railway tracks and a space of one foot in breadth outside of the rails. After the enactment of this statute the city, by ordinance, required the plaintiff to make such pavement outside of the rails of its railway track, and, in proper form, proceeded to make an assessment against plaintiff and its property to pay therefor. This action by *certiorari* is brought to test the validity of the city's action.

2. It will be remarked that, under the statutes of the state and the ordinance of the city when the corporate franchises were assumed by the city, and authority to construct its street railway was conferred upon it, it was required to pave between the rails of its railway, and no more. The subsequent statute of the state and ordinance of the city required it to pave the street

Power of city
to order paving.

outside of the rails to the extent of a space, next to each rail, one foot wide. The burden of paving a part of the street two feet in width was imposed by the recent state and city legislation in addition to the burden imposed by prior legislation. The controlling question of the case involves the validity of this legislation by the state and city. Prior to the corporate organization of plaintiff and the action of the city, brought in question in this case, Code, § 1090, was enacted, and continues to be in force. It is in the following language: "Sec. 1090. The articles of incorporation, by-laws, rules, and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged, or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

Counsel for plaintiff do not deny that, if the legislation in question pertains to or affects the rights and powers conferred by the articles of incorporation—what is called the "franchises"—of plaintiff, it is authorized by the section of the Code just quoted. Indeed, that could not well be denied, for the legislation authorizing the alteration and abridgement of the rights and powers—the franchises—of the plaintiff became a part of its charter, and was an express limitation of its franchises. But counsel insist that the obligation of the plaintiff to construct pavements was imposed by a contract between plaintiff and the city. We have said that the correctness of this proposition may be assumed for the purpose of the discussion in hand. What was that contract? It was this: The city conferred upon plaintiff authority to construct and operate a street railway, on condition, among others, that plaintiff should pave between the rails of its railways. The city contracts to secure to plaintiff its rights to construct and operate the railway. The plaintiff contracts to pave between the rails. The city, by granting the authority to construct and operate the railway upon the condition of paving, did not limit its authority to make and enforce other regulations and requirements, as authorized by Code, § 1090. The condition as to the paving is the obligation of plaintiff, and not of the city. The contract between the plaintiff and the city neither expressly nor by implication, ties the hands of the city, and gives it over to the plaintiff, without authority, to make and enforce other regulations as to the construction of the pavements. By the contract relied

upon by counsel the plaintiff binds itself to pave between the rails, but the city does not bind itself not to exercise the authority, conferred upon it by Code, § 1090, to impose other conditions upon the exercise of plaintiff's authority and rights—its franchise—which, in the judgment of the city, may be required by the public good. The arguments presented in our first opinion, supported by the foregoing considerations, lead to the conclusion that the city was authorized to impose the burden on plaintiff of additional paving, and that there was no contract between plaintiff and the city by which the latter was bound not to impose such burden on plaintiff. A petition for rehearing upon the former appeal was filed in this case, but was overruled at the present term of this court. The petition has been considered in connection with the arguments now before us. The judgment of the district court is affirmed.

Street Railway—Obligation to Pave and Repair Street.—See *Memphis, P. & B. R. Co. v. State* (Tenn.), 38 Am. & Eng. R. Cas. 429, note 433.

MAYOR, ETC., OF NEW YORK

v.

THIRD AVENUE R. CO. (2 cases.)

(*New York Court of Appeals, November 26, 1889.*)

Street Railway—License Fees—Liability of Company.—Where a franchise, for a street railroad has been granted, upon condition of the payment of the "annual license fee for each car now allowed by law," and at that time an ordinance existed imposing license fees upon each "accommodation coach" or "stage coach," the company is liable for the payment of the license fee imposed by the ordinance for each street car owned and operated by it.

APPEAL from General Term of the Supreme Court, First Department.

Action to recover license fees. The general term of the supreme court affirmed the judgment of the special term for the plaintiff (see 48 Hun, 621), and the defendant appealed.

James P. Lowrey, (*J. E. Parsons*, of counsel,) for appellant.
William H. Clark, counsel to the corporation, (*David H. Dean*, and *John J. Townsend, Jr.*, of counsel,) for appellee.

DANFORTH, J.—The inquiry is as to the construction of certain resolutions passed by the plaintiff's common council, December 18, 1852, accepted by Van Schaick and others, the defendant's assignors, and which formed the basis of an agreement between the mayor, aldermen and commonalty of the city of New York of one part, and Van Schaick and his associates of the second part. Those resolutions conferred a right to construct, run and operate the defendant's railroad, (*People v. Newton*, 112 N. Y. 396,) and the present action is brought to enforce payment of the consideration to which, by their terms, the plaintiff claims to be entitled. The obligation of the grantee is expressed in the resolutions. It follows the grant of power to the plaintiff's assignors, and in consideration thereof, and of other matters, it declares that they, "the said parties, shall pay from the date of opening the said railroad the annual license fee for each car now (December, 1852,) allowed by law, and shall have licenses accordingly." At that time an ordinance, entitled "Of stages and accommodation coaches," passed May 8, 1839, and amended in 1844, was in force, and required the payment of a license fee to the city of New York, "for its use," for every accommodation "coach or stage-coach" any person "shall keep, the sum of \$30, when drawn by four horses, and \$20 when drawn by two horses." The defendant, by virtue of the power and privileges conferred by the resolutions, has every year run over its road a large number of passenger cars, each drawn by two horses, and under the ordinance above set out the plaintiff has recovered a verdict for license fees of \$20 each, according to the number of cars run within the last six years. The courts below have given judgment upon the verdict, holding that the application of the ordinance was as contended by the plaintiff, and that the resolutions, according to the ordinary and natural interpretation of their words, subjected the defendant to the payment of the tax imposed by it. We are of the same opinion.

The general meaning or governing sense of the resolutions which recite the defendant's obligation is obvious enough. It is that in consideration of the franchise it bargains for it shall pay a license fee. It is to pay such fee from the opening of the road, annually, and it is to pay, not a fee thereafter to be imposed, but a fee already imposed and then existing in favor of the city. The ordinance then actually in force contains everything necessary to answer those conditions, but the contention of the defendant is that it enumerates as its subjects "a stage," "an accommodation coach," "a stage-coach," and is altogether silent as to a "railroad car," or even "car."

Case stated.

Liability of
company under
ordi-
nance.

We are unable to see the force of the observation. In definition, a "car" or "coach" or "stage" or a "stage-coach" is the same. They are vehicles that turn, or that run by turning, on wheels. Place boards over or between wheels, and we have a platform car, adapted to freight; place benches or chairs upon the platform, and we still have a car, but adapted to passengers, and then easily termed a "carriage." Instead of benches or chairs, put on the platform the body of a "stage-coach," and we have such a "railroad car" as served at the inauguration of the earliest railroad in our state. It is plain that by adaptation and improvement "the modern railway car has been evolved from the old-fashioned stage-coach." The American Railway, p. 231. In common language a railroad carriage designed for passengers is called indifferently a "coach" or "car." In every collection of words arranged according to the ideas which they express, these, and others with them, will be found classed together as having the same signification. Neither the word "coach," "stage," or "car" can be said to be words of art, or to have any legal or fixed meaning distinguishing one from the other, or any one of them from several other terms implying a vehicle or conveyance. We are therefore to look at the context of the resolution, and the circumstances, under which it was adopted, and especially at the matter which the parties had in contemplation.

1. There was a grant by one party of a valuable franchise or privilege in conveying passengers along one of the avenues of the city.

2 Over that avenue there were at that time three stage lines, accommodating a large travel, and these paying for each stage or coach a license fee of \$20 to the city of New York. In the nature of things the new mode of transportation would succeed the old. Its purpose was the same. The railroad would drive off the stages, or if travel sufficed the new vehicle and the old would at least run in competition. If driven off, the license fees would be lost to the city; and if both survived there was no reason why one company should be favored and the other not, or the city be denied its revenue from either. In fact, with the competition of the defendant's road the stage lines were completely superseded.

3. The receipt of revenue as part of the consideration of the granting of the new franchise was the object aimed at by the city, and its payment was part of the price agreed upon by the other party. Both then had a license fee in contemplation, and it is conceded that there was no other than that prescribed by the ordinance, *supra*, on which plaintiff now relies. We think the fee mentioned in the ordinance was

within the intention of both parties as expressed in the agreement, and concur with the court below in the conclusion that its payment may properly be enforced. The judgment appealed from is therefore affirmed. All concur.

License Fees under Charters of Street Railway Companies.—See *State v. Hilbert* (Wis.), 36 Am. & Eng. R. Cas. 118; *Mayor, etc., of New York v. Dry Dock E. R. & B. R. Co.* (N. Y.), 37 *Id.* 411.

CITY OF NEW ORLEANS

v.

CRESCENT CITY R. CO.

(*Louisiana Supreme Court, November, 18, 1889.*)

Street Railway—Bonus in Lieu of Taxation—Action for Bonus.—A municipal corporation which has contracted that a bonus shall be paid by a company to which it has granted street-railway privileges, in lieu of taxes, cannot, after agreeing to remit the bonus and to receive the taxes in its place, and after collecting such taxes, sue to recover the bonus, however true it be that the immunity from taxes was illegal. It cannot claim both.

APPEAL from Civil District Court, parish of Orleans.

Krouse & Grant for appellant.

J. M. Bonner for appellee.

BERMUDEZ, C. J.—The city sues to recover \$281,418.75, as due her by the defendant company, as the successor of one McCoard, to whom she had granted the privilege of running a street railway, and who was to pay, as a consideration for such rights, a certain bonus on every passenger carried. The period converted by the claim extends from 1866 to 1886, when this suit was brought. The defendant pleaded prescription, prematurity, and estoppel. A judgment was rendered, sustaining the plea of prescription, as against any claim for the bonus previous to the 24th of March, 1876, and maintained the defence of prematurity to the claim for a certain other bonus, subsequent to that date, and permitting the suit to stand for the difference. The judgment thus rendered was signed on the 1st of July, 1887. Answering the petition, the defendant company pleaded, mainly, that,

under the contracts with the city, the bonus stipulated was to stand in place of taxes, and that, by an agreement subsequently entered into, the city relieved the company from the payment of the bonus on payment of the taxes, and that, the taxes having been paid, the city cannot now claim, *insuper*, the bonus, as it cannot demand both. The district court, after hearing, gave judgment for the defendant, and the city appeals.

The defendant urges that the judgment first rendered, signed as stated, cannot be reviewed here, for the reason that, not having been appealed from it constitutes *res judicata*. An inspection of that judgment shows that it rejected plaintiff's demand, in part, absolutely, by denying to her the right to sue for the bonus claimed prior to 24th of March, 1876, the same being barred by prescription, and that it dismisses another part of the demand as premature. The plaintiff, if aggrieved by that judgment, ought to have appealed from it within the year following its signature; and as she did not do so, that judgment cannot be reviewed here.

Besides, by reference to the motion of appeal in the record, and which brings up the matter in controversy before this court, it appears that the city complains only of the judgment rendered on February 25, and signed on March 1, 1889, in favor of the defendant. The appeal from the judgment on the merits does not imply an appeal from an anterior final judgment, which disposed definitively of such parts of the demand as were not passed upon by the subsequent judgment, just mentioned. The objection is therefore well founded; and the claim for the bonus said to be due anterior to March 24, 1876, and some other bonuses after that date, cannot be here passed upon. Code Prac. art. 593; *Clay v. Creditors*, 9 Mart. (La.) 519; *Park v. Porter*, 2 Rob. (La.) 342; *Prejean v. Robin*, 14 La. Ann. 788. So that the only matter to be considered is the demand for certain bonuses said to be due after that date.

It would be tedious to enter into a recital of the lengthy, different ordinances passed, and contracts entered into, in relation to the rights and obligations of the respective parties. It is sufficient to state that it clearly results from their spirit and tenor, and from the construction put upon them by the parties, that the bonus was to be in place of taxes, and that all claim by the city to the bonus was relinquished on the defendants' paying their taxes. The evidence showing such payment, it follows that the claim for the bonus is without foundation, as the city cannot have a standing to claim both. New Orleans

Appeal—Judgment disposing of part of cause.

Appeal—Judgment reviewable.

Right to exact both bonus and taxes.

v. St. Charles St. R. Co., 28 La. Ann. 497; *New Orleans v. New Orleans Sugar Shed Co.*, 35 La. Ann. 548; *New Orleans v. New Orleans Water Works Co.*, 36 La. Ann. 432; *Rev. Civil Code*, art. 2031.

The record shows that, consulted as to the validity of a claim by the city of the bonus demanded, the then city attorney reported adversely, thereto. The present action, nevertheless, was brought by counsel specially engaged, who subsequently were joined by the successor of the consulted city attorney, but who did not offer any oral argument on the hearing of the case in this court. The district judge, after an elaborate statement of the pleadings and of the evidence, as well as of the different contentions of the parties, and points made by counsel, with an industry which does him credit, came to the conclusion that the judgment signed in July, 1887, could not be reviewed by him, as it had not been appealed from; and passing upon merits of what was left of the original demand by that judgment, he tersely and appropriately said:—"The suit is for the bonus of seven-sixteenths of one cent from March, 1876. From that date to the present time, under ordinances passed by the city council, the city has collected all the taxes due,—\$117,910.17,—and no bonus. The bonus, under the original contract, was in lieu of taxation. The city cannot collect both bonus and taxes. Having elected to collect the taxes, she cannot now sue for the bonus. It has been so decided by the supreme court. There can be no doubt that, as the city had no power to exempt from taxes, or agree legally to a commutation, the stipulation of exoneration was in contravention of law, but it does not follow that therefore the city must recover the bonus. The understanding was that the bonus should be paid, provided no taxes were demanded. If the condition upon which the bonus was to be paid be prohibited, then it is void, and its nullity is destructive of the contract upon it. The city, therefore, cannot recover both the taxes and bonus." We think those reasons conclusive, and we adopt them. Judgment affirmed.

ARBENZ

v.

WHEELING & HARRISBURG R. CO.

(West Virginia Supreme Court of Appeals, September 13, 1889.)

Street—Power of Company to Construct Track in Excavation.—Under the provisions of the West Virginia statute, (section 50, chap. 54. Code 1887,) a railroad company, with the assent of the municipal authorities, may construct and operate its railroad along a public street of a city, in a cut or excavation below the common level of the remaining portion of the street, in such manner as will appropriate a portion of the street to the exclusive use of the railroad company, provided such excavation does not occupy the entire street, or such considerable portion thereof as would substantially prevent the use of the street by the general public, and provided, further, that it does not unnecessarily impair the usefulness of the street as a highway for the general public.

Same—Injunction at Suit of Abutting Lot-owner.—The abutting lot-owners on the street so occupied by the railroad company, whether they own the fee in the ground covered by the street or not, will not be entitled to enjoin the railroad company from making such excavation and constructing its road along the street in a careful and proper manner, unless, in doing so, the injury to the lot-owner will be such as will entirely destroy the value of his property, and therefore be equivalent to a virtual taking of it by the railroad company. In the case at bar it is held that there will be no such destruction of the value of the plaintiff's property as will entitle him to an injunction to restrain the railroad company from constructing its road until the damages are ascertained and paid, or secured to be paid.

APPEAL from Circuit Court, Ohio County.

W. P. Hubbard for appellant.

H. M. Russell for appellee.

SNYDER, P.—The Wheeling & Harrisburg Railway Company, a corporation chartered under the general railroad law of this state, by an ordinance adopted by the council of the city of Wheeling on January 18, 1889, obtained the consent of said city to construct a branch railroad in and upon certain streets of said city. The ordinance, among other things, authorizes said company to use for the construction and operation of its road a portion of Twentieth street, in the city. This street runs east and west near the foot of a high hill. It is constructively 60 feet wide, but, owing to the character of the ground on which it is located, only 30 feet or less on the north side of it has been graded and opened as a street, leaving a high and almost perpendicular

Facts.

bluff on the south side of this grade near the center of the projected street. On the north side of this street, and abutting upon it, are two lots of land owned by the plaintiff, John Arbenz, and upon each of these lots there is a brick building constructed and used for manufacturing purposes. These lots also abut on public alleys at their respective ends, and on Eoff street, which runs between them at right angles to Twentieth street. The ordinance provides that the railroad company may construct its road in a cut or excavation along the bluff in said street, and thus occupy a small portion of the graded part of the street in front of the plaintiff's property. The excavation to begin at nothing at the eastern end of said property, and gradually increase in depth going westward, until at a point beyond the said property it will be of sufficient depth to admit of its being covered by a roadway under which defendant's cars can pass. In front of the plaintiff's buildings the excavation will be an open cut in the street, inclosed at the top by an iron railing; thereby separating the railroad track from the remaining graded portion of the street. The facts in the record show the present graded portion of Twentieth street along the front of this property is only about 24 feet in width, and that after the railroad is constructed there will still remain open 22 feet of this street between plaintiff's property and the said iron railing on the side of the railroad track; thereby making it appear that but 2 feet of the traveled and graded part of the street will be occupied by the excavation and railroad track. The heavy grade of the street at this point renders it impracticable to construct the railroad track on the surface grade of the street; and therefore, in order to construct the railroad along this street, the excavation is a necessity.

The said railway company having commenced the construction of its road along said street in the manner aforesaid, and under the authority of the aforesaid city ordinance, the plaintiff filed his bill in the circuit court of Ohio county, alleging the aforesaid facts, among others, and praying an injunction to restrain the defendant, the said railway company, from constructing its road along said Twentieth street, in front of his property, in the manner authorized by the said ordinance, upon the ground that the ordinance was unauthorized by law and void. The court on March 2, 1889, awarded a preliminary injunction. The defendant promptly answered the bill, and upon notice to the plaintiff the defendant moved the court to dissolve the injunction. This motion was fully heard, and on March 9, 1889, the court entered an order overruling it, and refusing to dissolve the injunction. The defendant thereupon moved the court to modify the injunction so as to

permit the railroad company to proceed with the construction of its road, upon giving bond with security to pay all damages and costs that the plaintiff may sustain or incur by the construction of its road, etc. This motion the court sustained, and the injunction was modified accordingly. The plaintiff then moved the court for a rehearing of that part of the order modifying the injunction; which motion the court granted, and postponed the argument, and the consideration thereof, to a future day. Afterwards, on April 6, 1889, the court sustained said motion of the plaintiff, and set aside that portion of its order of March 9, 1889, allowing the defendant, upon giving bond, to continue its work. From the said order of March 9, 1889, refusing to dissolve the injunction, and also from said order of April 6, 1889, setting aside the order authorizing the defendant to give bond and continue its work, the defendant has appealed to this court. No depositions were taken in the cause, and consequently the only facts before us are those contained in the exhibits filed, the admissions in the answer, and the allegations of the bill not denied or controverted by the answer.

The plaintiff alleged in his bill several grounds for relief, but one or more of them seem to have been abandoned, and those argued and insisted upon in this court may be considered as resting upon a single proposition, viz., that the council of the city of Wheeling had no legislative authority to pass the said ordinance of January 18, 1889, giving to the defendant, in the manner before stated, the exclusive occupancy of a portion of Twentieth street. It is insisted—*First*, that such occupancy, without legislative authority, would constitute a nuisance, and that such occupancy, in the absence of legislative authority, was not, and could not be, legalized by the city ordinance; and, *second*, if it should be held that the city had the right, as between the public and the city, to pass said ordinance, then this appropriation of a portion of the street to the exclusive use of the defendant would constitute an abandonment by the city of that portion of the street, and the same would revert to the plaintiff as the owner of the fee.

1. It may be conceded as a settled legal principle that, in the absence of legislative authority empowering it to do so, a city or other municipal authority cannot authorize, by ordinance or otherwise, a private person or corporation to appropriate a street, or any part of it, so as to exclude the general public from its free and unobstructed use; and that this principle applies to railroad as well as to other corporations. The material question, then, to be now determined, is whether or not the city of Wheeling had legislative authority to grant to the

Authority of
city to author-
ize appropria-
tion of street.

defendant the use of the street in the manner it did by said ordinance of January 18, 1889.

The forty-fifth section of the act of March 11, 1836, incorporating the city of Wheeling, provides as follows: "The council shall have authority within said city to lay out and cause to be opened any streets, walks, alleys, ^{City charter.} * * * and to graduate any street, walk, alley, * * * which is or shall be established within said city * * * and generally to ordain and enforce such regulations respecting the same, or any of them, as shall be proper for the health, interest, or convenience of the inhabitants of said city." In addition to this power granted to the city of Wheeling by its charter, the legislature, in section 50 of chapter 54 of the Code of this state, has granted certain general powers to the defendant and other railroad corporations, among which are the following: "To lay out its road, not exceeding one hundred feet in width, and to construct the same; and, for the purpose of excavations and embankments, to take as much more land as may be necessary for the proper construction, repair, and security of the railroad. * * * To change the grade or location, * * * and to adopt a new line, location, or route for the same, for the purpose of avoiding annoyance to public travel, or dangerous or difficult curves or grades, or unsafe, impracticable, or unsubstantial, or expensive or otherwise undesirable locations, routes, grounds, or foundations, or for other reasonable cause. * * * To construct its railroad across, along, or upon any stream of water, watercourse, street, highway, road, turnpike, or canal which the route of such railroad shall intersect or touch; but such corporation shall restore the stream, water-course, street, highway, road, turnpike, or canal, thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness, and to keep such crossing in repair. Nothing in this chapter contained shall be construed to * * * authorize the construction of any railroad upon or across any street in the inhabited portion of the city, or incorporated town or village, without the assent of the corporation of such city, town, or village."

It will be observed that the same section of this statute which provides for the construction of a railroad along or upon a street, and the establishment of its grade, also provides for the making of excavations and embankments where "necessary for the proper construction, repair, and security of the railroad;" and also the provision which declares that the street intersected or touched shall be restored "to its former state," "or to such state as not unnecessarily to have impaired

Necessity of restoring street to its former condition.

its usefulness." The clear and necessary implication of this language is that the legislature intended to authorize the construction of a railroad along or upon a street in such manner that it would be impracticable to restore the street to its former state. Unless such was the purpose, the alternative provision, limiting the duty of restoring the street, would be without meaning or effect. In such cases the requirement is simply that there shall be no unnecessary impairment of the usefulness of the street. Any necessary impairment, whether much or little, which is required for the proper construction of the railroad, is authorized by the statute. The only limitation is that there must be no unnecessary impairment or interference with the street. The facts in the case before us certainly do not show that the power granted to the defendant by the city of Wheeling authorizes it to unnecessarily impair or interfere with the usefulness of Twentieth street. The evident purpose of this provision is that the ordinary use of the street or highway should not be stopped by the railroad, but that its continuance should be provided for, when necessary, by alteration in the street itself, which should increase the impediment and inconvenience of travel upon it as little as possible. It is obvious that in many cases this would be necessary, because from the nature of the work it is important and often necessary that the railroad should be kept on a given level, and not be raised so as to adapt it to the existing levels of the street. *Newburyport Turnpike Co. v. Eastern R. Co.*, 23 Pick. (Mass.), 326; *Baltimore & O. R. Co. v. Wheeling & Ky. R. Co.*, 17 W. Va., syllabus 17, pp. 813, 852, 10 Am. & Eng. R. Cas. 444.

It is insisted for the appellee, and it is unquestionably true, that corporations, whether railroad or municipal, have only the powers conferred upon them by their charters or the general statutes applicable to them; and these powers are only such as are granted in express words, those necessarily and fairly implied in the powers expressly granted, and those indispensable to the declared objects of the corporation. *Charleston v. Reed*, 27 W. Va. 681; *Gas Co. v. Parkersburg*, 30 W. Va. 435, 439. While this is the established rule in respect to the powers of corporations, it is equally true and well established that power to do an act carries with it the authority to do it in a mode that is just, reasonable, and practicable, taking into consideration the peculiar circumstances of each case. *Alabama G. S. R. Co. v. South & North Ala. R. Co.*, 84 Ala. 570. The legislature may well be careful in delegating powers to corporations; but when it does grant powers it must be presumed to grant them with confidence in the judgment and discretion of the

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corporations.**

corporation, allowing all that freedom in the choice of means proper to attain the desired end which is needed to insure success. In respect to the limited powers of congress under the federal constitution, the supreme court of the United States held: "If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may be constitutionally employed to carry it into effect." *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1. Every grant of power is intended to be efficacious and beneficial, and to accomplish its declared object, and carries with it such incidental powers as are requisite to its exercise. If, then, the exercise of the power granted draws after it a necessary consequence, the law contemplated that consequence. Inhabitants of *Springfield v. Connecticut Riv. R. Co.*, 4 Cush. (Mass.), 63, 72.

It must be conceded that the legislature, by the statute above quoted, has in express words granted to railroad companies the power to construct roads along or upon the streets of a city. It must also be conceded as facts well known to the legislature, and of which we may take judicial notice, that West Virginia is a mountain state, and that many of the streets of its cities, towns, and villages are upon hilly ground, and their grades uneven and steep. The grade of a railroad necessarily embraces considerations of convenience, expense, and facility of construction and operation, and is fixed at a particular point with reference to grades at other points. It is therefore not only proper and reasonable, but almost indispensable, that railroad companies should be allowed a very large discretion in the location and fixing the grades of their roads. It seems to me to be a fair presumption that, when the legislature granted to railroad companies the right to occupy and use the streets of cities, towns, and villages of this state, it intended that they should have the privilege of constructing their roads, to a large extent, in their own way, and of passing along and upon or crossing the street, over, under, or at grade, provided they shall not unnecessarily impair the usefulness of the street. *People v. New York Cent. & H. R. R. Co.*, 74 N. Y. 302; *Adams v. Saratoga & W. R. Co.*, 11 Barb. (N. Y.), 414, 450. This construction of our statute is greatly strengthened by the qualification therein which prohibits railroads from occupying any street without the assent of the municipal authorities. It is very safe to assume that the city authorities will be careful to protect their streets from any improper use by a railroad company; and that, in giving their assent to the use of a street, they will do so in

Authority to
construct rail-
road along or
upon city
streets.

such manner as will in the least possible degree impair its usefulness. It is certainly possible that under some circumstances it may be more practicable and cause less inconvenience to the public, and do less injury to the abutting lot-owners, to allow the railroad to occupy a portion of the street at a grade below or above the grade used by the general public, than would be the case if the grade of the street was changed by lowering or elevating it to the necessary grade of the railroad. Therefore, unless it clearly appears that the municipal authorities have abused their discretion by allowing such occupation of the street as will unnecessarily impair its usefulness, it seems to me it would be very unwise and improper for the courts to undertake to supervise their action. *Plant v. Long Island R. Co.*, 10 Barb. (N. Y.), 26.

It is contended, however, for the appellee, that by the use of the words "across, along, or upon," in the statute, the legislature intended to limit and restrict the grant so that the railroad should be upon the surface at a common level with the rest of the street, in order that the public may use the entire street at all times, except when trains are passing; and that this restriction was designed to prohibit the railroad from the exclusive occupation of any part of the street. It is claimed that the words "across, along, and upon" must be applied distributively to the words "stream of water, water-course, street, highway," etc.; that the word "along" should be referred to a "stream of water or water-course," and means along the side of the stream; while the word "upon" must be referred to a "street or highway," and means upon the surface of the street. In support of this construction, we are referred to the cases of *Stevens v. Erie R. Co.*, 21 N. J. Eq. 259; *Stevens v. Paterson & N. R. Co.*, 34 N. J. Law, 532. These authorities simply show that the context of the New Jersey statute authorizing a railroad company to construct its road along a river did not authorize it to construct its road in or upon the river, but alongside of it; because to construct the road in the river would require the filling in of the river-bed, which it had no authority to do. There were other considerations in this case that controlled the action of the court which are wanting in the case at bar. The word "along," used with reference to a street, could not, in our statute, mean "along the side" of the street, because such meaning would confer no right whatever in respect to the street, but would leave the railroad to make its way through the adjoining lots owned by private individuals, without the consent of the city, or any aid from this statute. *Heath v. Des Moines & St. L. R. Co.*, 61 Iowa, 11, 10 Am & Eng. R. Cas. 313. The word "upon," in this statute, does not necessarily mean upon the common grade of the street. In order to thus

confine its meaning, we must imply the words "level with the surface." There is nothing in the context to require, or even to justify, this implication.

For the reasons before stated, I am of opinion the words "along or upon," employed in the statute, must be construed with reference to the context and the subject in controversy, and when so fairly construed in respect to a case such as the one now under consideration, they must be understood to mean along in the street, at, above, or below the common level of the existing or changed surface of the street, accordingly as the particular facts and circumstances may require. But I am of opinion that this statute does not authorize the occupancy by a railroad, for its exclusive use, of the entire street, or of such considerable portion of it as would substantially prevent the use of it by the general public, notwithstanding such exclusive use may be expressly authorized by the city authorities. Where the railroad occupies a different grade, either in an excavation below, or upon an embankment above, the general surface or grade of the street, it necessarily has the exclusive use of the portion of the street so occupied by it. The use of the word "unnecessarily," in the statute, clearly implies that the usefulness of the street may be to some extent impaired; but this certainly does not mean that the street should be rendered useless. The streets of cities are public highways, and, as such, under the control of the state alone, and the state may grant the use of them against the will of the municipality. The city alone cannot grant to a railroad the privilege of using its streets, as the power is in the legislature. The legislature may discontinue the use of streets without restraint from private citizens claiming to be interested in the continuance of the street, as adjoining owners or otherwise. The control of city streets may be properly delegated to the city authorities, with discretion to impose conditions on the use of the street; but the power is not in the city, unless expressly delegated. *Mills, Em. Dom. § 202; Covington St. R. Co. v. City of Covington, 9 Bush (Ky.), 127.* In the case before us it appears that Twentieth street is not materially obstructed, nor is its usefulness unnecessarily or unreasonably impaired. The facts show that the present width of the graded portion of the street in front of the plaintiff's property is only 24 feet, and that after the proposed excavation is made for the defendant's railroad the unobstructed portion of the street will still be 22 feet; thus showing that but 2 feet of the present open and graded part of the street will be occupied by the railroad. As before stated, there is nothing in the record of this case to show that this is either an unnecessary or unreasonable appropriation or use of the street; and there-

fore we must hold that it is authorized by the statute, and the use and occupation of it by the railroad company in the manner aforesaid will not constitute a nuisance. *Perry v. Alabama, etc. R. Co.*, 55 Ala. 413; 2 Dill. Corp. § 711, (564.)

2. After what has been said in the preceding portion of this opinion, very little discussion is required to show the untenableness of the second proposition of the appellee, viz., that the appropriation of a portion of Twentieth street by the city to the exclusive use of the railroad constitutes an abandonment by the city of its easement in that portion of the street, and consequently the title reverts to the plaintiff as the owner of the fee. It might be a sufficient answer to this claim to urge that the record does not show that the plaintiff is the owner of the fee in this street. It is true, his bill avers that he is such owner; but the answer of the defendant denies this averment, and there is no proof to sustain it. But for present purposes we will assume that the plaintiff is the owner of the fee in the street, subject to the easement in the public. The use by a railroad, under legislative authority, of the street of a city, in its ordinary use as a means of travel and transportation, is not an abandonment or perversion of the street from its original purposes. Time, the unerring test in the utilization of new discoveries, has demonstrated that long and connecting lines of railroad greatly facilitate and cheapen transportation. To construct and operate such lines, it is necessary that cities shall be traversed by them. The city is necessarily traversed by and through its streets, and by laying a railroad track through or along a public street the use and comfort of the latter as a highway must be somewhat impaired. When this is done under proper authority, it is but the assertion of so much of the sovereign power and discretion by which one right or easement is abridged in its enjoyment that the public may have another deemed to be of greater value. *Perry v. Railroad Co.*, 55 Ala. 413, 424; *Porter v. Railroad Co.*, 33 Mo. 128. This doctrine is especially true in this state, because our constitution (article 11, § 9), expressly declares that all railroads shall be public highways, free to all persons for the transportation of their persons and property. The use of a street, therefore, in this state, by a railroad for its track, is not an abandonment of the easement, but simply the imposition of an additional servitude for the benefit of the public.

All the questions involved in this case were necessarily decided by this court in *Spencer v. Point Pleasant & O. R. Co.*, 23 W. Va. 406, 21 Am. & Eng. R. Cas. 478. In that case, however, no question was raised as to the right of the railroad company to occupy the street; and therefore, in deference

to the very earnest and ingenious argument of the counsel for the appellee, I have deemed it proper to consider, as I have done, the grounds upon which that right is founded. But while the right was conceded, and not discussed, in that case, it was involved, and of necessity decided. There the railroad company, with the consent of the municipal authority, constructed along in the center of one of the public streets of the town an approach to a railroad bridge, consisting of trestle-work and masonry, upon which the track of the railroad was laid several feet above the surface or common level of the street. Spencer, an abutting lot-owner, sought by injunction to restrain the railroad company from constructing its approach in front of his lot until compensation should first have been made to him as the owner of the fee in the street. This court decided that such use and occupation of the street by the railroad company was not a taking of the plaintiff's property, and that he was not entitled to an injunction to prevent the construction of said approach until the damages he might sustain should be ascertained and paid. The second and sixth points in syllabus of that case are as follows: "(2) If a railroad company, without taking the land, damages it by the construction of its road, the owner of such land cannot, as a matter of right, enjoin said company, so proceeding with the construction of its road, till such damages are ascertained and paid; for section 9 of article 3 of our constitution, while it gives a right in such cases to recover of a railroad company such damages in an action at law, does not give a right to such injunction, as it does not require such damages to be paid, or secured to be paid, before such damages actually arise by the construction of the road." "(6) But such lot-owners, whether they own such fee in the street or not, may, by an action at law, recover of such railroad company such damages as they might have recovered in a common-law suit, had the railroad company built its road in said street without proper authority; for while such railroad company has built its road by proper authority, conferred directly by the legislature, or by a town council authorized so to do by the legislature, it cannot be regarded as committing a nuisance in so building its road, and using it in a careful and proper manner. Yet, under section 9 of article 3 of our constitution, said railroad company is liable for the permanent damages it inflicts on such adjoining lots, in the same manner as if it had built its road without such proper authority; but, after it has been once sued for such damages, it is not liable to be sued for the nuisances which necessarily result from the running of its cars through such street, for, in so doing, it is only exercising its rights, and is not committing a nuisance." The only qualification of the

general rule thus announced is that when the property of the lot or land owner, though not actually appropriated by the railroad company for its uses, is nevertheless as effectually destroyed in value as if it had been in fact taken by the company for the construction of its road, the owner of the property so destroyed may obtain an injunction to restrain the company until the damages are paid, or secured to be paid. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

In the case before us, whatever may be the character and extent of the damage to the property of the plaintiff by the construction and operation of the railroad in the manner proposed by the defendant, it is quite certain that it will not amount to such an absolute destruction of the value of the property as will be equivalent to a virtual taking of it; and therefore, according to the decision of this court in the aforesaid case of *Spencer v. Point Pleasant & O. R. Co.*, the plaintiff was not entitled to an injunction to restrain the defendant from the construction of its road along Twentieth street in the manner it claims the right to do in its answer, and consequently the circuit court erred in refusing to wholly dissolve the injunction. The questions as to whether or not the plaintiff is entitled to damages for the injury, if any, done to his property by the construction and operation of the defendant's railroad along Twentieth street, or the extent of said injury, and the amount of said damages, do not arise in this suit; because, for the reasons before stated, his redress for such injury, and the recovery for such damages, must be sought by him in a proper action at law, after he has sustained the damages by the actual construction of the railroad. It necessarily follows from this conclusion that the circuit court also erred by its order of April 6, 1889, setting aside the order of March 9, 1889, modifying the injunction so as to allow the defendant to proceed with the construction of its road upon giving bond, etc. The injunction itself being improper, every act or order suspending its operation or destroying its effect would diminish the error; while the setting aside of such order would, of course, prejudice the right, and increase the wrong.

For the reasons aforesaid, I am of opinion that so much of the aforesaid order of March 9, 1889, as overruled the defendant's motion to dissolve the injunction, and the whole of said order of April 6, 1889, should be reversed; and, this court proceeding to enter such order and decree as the circuit court should have entered, it is ordered that the injunction awarded the plaintiff on March 2, 1889, be wholly dissolved and the plaintiff's bill be dismissed, with costs.

GREEN, ENGLISH, and BRANNON, J. J., concurred.

Right of lot-owner to injunction.

Construction of Railroad in Street—Right of Lotowner to Maintain Ejectment.—The Atchison town company platted a tract of land lying on the west bank of the Missouri river for a town site, indicating on the plat that there was a street along the river, but failing to show the width of the street, or to indicate by figures the dimensions of the lots and blocks fronting thereon. Subsequently, under authority of the legislature, a highway of a specified width was established along the river, within the limits of the city, and thereafter the city authorized a railroad company to construct and maintain a railroad upon the highway so established, which was done. The ground occupied by the company does not extend beyond the limits of the highway and the occupancy of the highway by the railroad company has continued from that time until the present. An owner of a lot fronting on the street claimed that, according to the plat and dedication, the railroad company was occupying a portion of his lot, and brought an action to eject it therefrom. *Held*, that, as the railroad was constructed upon a highway or street of the city established as aforesaid, and was laid thereon by authority of the city, the action of ejectment could not be maintained. *Atchison & Nebraska R. Co. v. Manley*, Kan. Sup. Ct., Nov. 9, 1889. JOHNSTON, J., who delivered the opinion of the court, said: "From the facts disclosed in the record, it must be held that a street 66 feet in width was legally established upon the levee. While the fee of the street was in the county, the control of the same was in the city, and it was within the power of the city to grant to the railroad company the right to construct and operate its road over this levee or street. *Atchison & N. R. Co. v. Garside*, 10 Kan. 552. There is no claim that the road was not constructed in a legal and proper manner, as the ordinance of the city provided; but, this being an action of ejectment the right to recover damages for such failure is not involved. According to the testimony and findings the railroad is laid upon an established street within the city. In pursuance of ample power conferred upon the company by the city to occupy and use the street for this public purpose, and as this occupancy and use has never been abandoned, it follows that Manley cannot maintain an action to dispossess or eject the company from the street so occupied."

GRIFFIN

v.

SHREVEPORT & A. R. Co.

(Louisiana Supreme Court, October Term, 1889.)

Eminent Domain—Compensation for Consequential Damages—Louisiana Constitution.—Under article 156 of the Louisiana constitution, providing that "private property shall not be taken nor damaged for public purposes without just and adequate compensation first paid," it is not necessary to establish an actual trespass or physical taking of the property itself. It suffices if the property has been substantially damaged by the public work.

Same—Obstruction of Access to Property.—When a railroad company builds in a public street an elevated embankment for its roadbed, the effect of which is to seriously impair and obstruct the access to plaintiff's prop-

erty, and to impair its value, it is not protected from responsibility by showing corporate authority for the work.

APPEAL from District Court, Parish of Caddo.

Alexander & Blanchard for appellant.

Land & Land for appellee.

FENNER, J.— The plaintiff claims damages in the sum of \$10,000, being the amount of diminution of the market value of her property occasioned by the construction by defendant of elevated embankments for the laying of its tracks along streets contiguous to said property, and several feet above the grade of said streets, the effect of which is to obstruct and partially to cut off access thereto. The answer of defendant admits the building of the embankments and tracks, but avers that said constructions were made under authority of the council of the city of Shreveport; that therefore it acted in exercise of a legal right, with due care and caution, and is not liable for any resulting damage to plaintiff.

The article 156 of the present constitution of this state provides: "Private property shall not be taken nor damaged for public purposes without just and adequate compensation first paid." A similar article in the constitution of the state of Illinois has recently passed under the review of the supreme court of the United States, and it was held that under such provisions a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of a public improvement, whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential, as in diminution of its market value. *Chicago v. Taylor*, 125 U. S. 161, 22 Am. & Eng. Corp. Cas. 384. The opinion is well considered, and conforms to the rulings of the supreme court of Illinois on the same subject. *Rigney v. Chicago*, 102 Ill. 64; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 518, 14 Am. & Eng. R. Cas. 152. The doctrine seems to us clearly correct, and we adopt it. It follows that the authorization by the city of Shreveport cannot avail to protect the defendant. Had the city itself done the work, it would have been responsible.

There is no serious conflict in the evidence on the point that the embankments do materially obstruct access to plaintiff's property, and impair the convenience of its use as a cotton warehouse, for which it is constructed. We are not concerned, in this case, with the character and extent of the consequential damages for which a party may be entitled to recover in such

Compensation
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Obstruction
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property.

case. The plaintiff has herself confined her demand to the diminution in the market value of her property, and the authorities quoted leave no doubt that this is a recoverable element of damage.

There is really but one controvertible question in the case, viz., the quantum of damages. The case was tried before a jury, which heard the testimony, viewed the *locus in quo*, and returned an apparently unanimous verdict for \$1,625. A motion was made for a new trial, and the judge rendered a written opinion refusing it, in which he says the jury was an intelligent one, and announces his own approval of their verdict. We have carefully read and considered the testimony, which is conflicting and contradictory in the estimates of the effect of the works upon the value of the property. While we are not bound by the findings of a jury, even on questions of fact or of damage, and do not hesitate to reverse them when manifestly erroneous or excessive, yet we give them the weight to which they are justly entitled, and do not lightly disturb them. We can find no warrant to reverse the verdict in this case, which is moderate in amount, and fully sustained by numerous witnesses, though contradicted by others. Judgment affirmed.

Eminent Domain—Compensation for Consequential Injuries.—See *Shepherd v. Baltimore & O. R. Co.*, (U. S.) 38 Am. & Eng. R. Cas. 437, note 443.

JACKSON.

v.

KIEL.

(*Colorado Supreme Court, November 1, 1889.*)

Construction of Railroad in Street—Compensation for Obstruction of Access.—Where the ingress and egress to and from plaintiff's property is solely by means of the intersection of a street with the street upon which his property fronts, the latter street extending only a short way beyond it, he is entitled to compensation from a railroad company for keeping continually standing upon its tracks and near the intersection, a number of freight cars which completely cut off plaintiff's ingress and egress to and from his property.

Same—Measure of Damages—Instruction.—Ordinarily, the measure of damages for the destruction of plaintiff's ingress and egress to and from his property, is the difference in rental value occasioned by the destruction, though under some circumstances the recovery may be greater, and the

railroad company cannot complain of an instruction authorizing the jury to return a verdict for the difference in rental value.

APPEAL from Superior Court of Denver.

Kiel, plaintiff below, is the owner in fee of lot 3, block 36, West Denver. This lot, upon which is erected four dwelling-houses, with fences, out-buildings, etc., fronts a distance of 66 feet on Tenth street. Wyncoop street, which intersects Tenth street 132 feet south-easterly of plaintiff's lot, furnishes the only approach thereto; Tenth street terminating a few feet beyond, and there being no connecting street or alley in the opposite direction. The Denver & Rio Grande Railway Company erected its railroad track along Wyncoop street, through the space of intersection with Tenth street, and on the premises intervening between plaintiff's lot and said Wyncoop street. At the commencement of the action it had 17 such lines of track; the nearest being within 20 feet of plaintiff's premises. During the time mentioned in the complaint, defendant, receiver of the road, kept continually standing upon these tracks a large number of freight-cars, completely obstructing and cutting off plaintiff's ingress and egress with vehicles to and from his property. Touching this subject, the complaint contains the following averment: That defendant "has continuously obstructed said Tenth street by standing cars thereon, to the exclusion therefrom of all travel thereon, and has cut off all access to and from plaintiff's said lot and premises by vehicles of every kind, so that his said dwellings have remained vacant, whereby," etc. Defendant demurred to the complaint upon the ground that it did not state a cause of action. The demurrer was overruled; and from the order thus entered defendant appealed to the supreme court, under the practice act of 1885. Thereafter the cause duly proceeded to trial; defendant's counsel appearing, cross-examining witnesses, offering evidence, and interposing objections from time to time. The trial resulted in a verdict and judgment for plaintiff, from which judgment another appeal was duly taken. By stipulation of counsel, the two cases were consolidated, and the two appeals were to be heard and decided together.

Wolcott & Vaile for appellant.

Brown & Putnam for appellee.

HELM, C. J.—We shall decline to follow counsel into a discussion of the question whether plaintiff has, and has sufficiently pleaded, a right to recover for injuries to his property occasioned by the construction and operation of the railway mentioned through the intersection of Tenth and Wyncoop streets. The com-

Sufficiency of
complaint.

plaint is not artificially worded, but it appears to have been framed upon the theory of an unlawful obstruction or abatable public nuisance, whereby plaintiff suffered a special and peculiar private injury; and we think enough facts are averred in support of this cause of action to justify the court in overruling the general demurrer interposed by defendant.

Both the pleadings and evidence show clearly that the ingress and egress to and from plaintiff's property by vehicles was had solely by means of the intersection of Wyncoop street with Tenth,—the street upon which his lot fronts. In no different way, circuitous or otherwise could his premises be thus reached.

Damages for obstruction of street.

The right to a free use of this space of street intersection for purposes of ingress and egress was therefore as closely identified with his lot, and interference therewith was as peculiar and personal an injury, as if the obstruction had prevented access from his lot to the street immediately adjacent thereto. A complete blockade of Tenth street at this point would produce damage to his property hardly less direct and serious than would the vacation and closing up of this street in front of his lot. It appears beyond question that defendant kept a large number of railway cars on Wyncoop street, across the space of its intersection with Tenth; that during the entire period covered by the complaint the obstruction thus created rendered it absolutely impossible for vehicles of any kind to reach plaintiff's premises. The completeness of the obstruction is clearly shown by the testimony of defendant's own witness, the general yard-master of the railway company, who says, among other things: "We have never kept Tenth open, or recognized it as a street." It also, in like manner, appears that, in consequence of this obstruction, plaintiff was seriously damaged by the depreciation of the rents received for his premises. Tenth street was a public highway; and an unauthorized obstruction thereof, especially if long continued, would constitute a public nuisance. If we assume that the right of way along Wyncoop street at this point was lawfully obtained, in the first instance, for the purpose of constructing and operating the railway, such right did not authorize the complete blockade of the crossing. Defendant could not absolutely destroy, for a considerable period, the usefulness of this part of Tenth street for the usual street purposes under any license or authority appearing in the record before us. He was bound to so use the right of way obtained as not to permanently prevent the passage of vehicles, and the employment of the street in other ordinary uses. Plaintiff, of course, could not recover for any general inconvenience thus occasioned which he may have suffered in com-

mon with the general public; but for the special and peculiar injury shown in this case he was doubtless entitled to compensation.

Appellants have no cause to complain of the measure of damages recognized in the charge to the jury. The difference in rental value occasioned by the nuisance or obstruction is the rule usually adopted in such cases; though under proper circumstances, the recovery may take a wider scope. The right to recover, if established, includes "the depreciation of rental value; by the difference, in other words, between the rental value free from the effects of the nuisance and subject to it." 3 *Suth. Dam.* 441, and cases. The ruling of the court below, from which the first appeal was prosecuted, and its final judgment, from which the second appeal was taken, are both affirmed.

This case is referred to and distinguished in *Gilbert v. Greeley, Salt Lake & Pac. R. Co.*, *post* p. 306.

GILBERT

v.

GREELEY, SALT LAKE & PACIFIC R. CO.

(*Colorado Supreme Court, December 6, 1889.*)

Eminent Domain—Compensation for Consequential Damages.—Under article 11, § 15, Const. Colo., private property must be taken, or private property must be damaged, before a cause of action arises. The damage must be to the property or its appurtenances, or it must affect some right or interest which the owner enjoys in connection with the property not shared or enjoyed by the public generally. The damage must differ in kind, not merely in degree.

Same—Special Damage.—It is only when some specific private property or some right or interest therein or incident thereto, peculiar to the owner, is taken or damaged for public or private use that the constitution guarantees compensation therefor.

Same—Obstruction of Street.—One traveler has no more legal ground of complaint on account of an obstruction in the public highway than others, unless he be entitled to use the highway at the point of such obstruction for a different purpose than other people, or has suffered some special injury therefrom. The fact that he may be more frequently inconvenienced thereby does not give a cause of action.

APPEAL from District Court, Boulder County.

This action was brought by Richard Gilbert, plaintiff, against the Greeley, Salt Lake & Pacific Railway Company, defendant, to recover damages occasioned to the premises of plaintiff by the construction and operation of defendant's railroad. The cause was tried in the district court without a jury, by stipulation, upon an agreed statement of facts, as follows: "It is agreed that defendant is a railroad corporation and incorporated for the purpose of building and operating a railroad which should run from Greeley, Colorado, to the town of Boulder, up Penn gulch, and westward thereof; that its road was built into the town of Boulder in the year A. D. 1881, and that by an ordinance or license of the town of Boulder, said town of Boulder being then and there an incorporated town, the said defendant was authorized and permitted to run its road and lay down its track through and along water street, in said city, from a distance of several hundred feet below and east of Twelfth street, in the said town of Boulder, past and across Twelfth street, westward; that the main line of said road thus running up Water street, which said Water street runs at right angles to Thirteenth and Twelfth streets, crosses Twelfth street at a distance of about 200 feet from the premises of said plaintiff, hereinafter referred to; that at or near Thirteenth street, a distance of about 400 feet east of Twelfth street, the said defendant has constructed a side-track or switch, which departs from the main line at an angle, and runs westerly from said main line and across Thirteenth and Twelfth streets, in said town of Boulder, and that said side-track or switch is situated upon lands owned by the said defendant, from at or near said Thirteenth street up to said Twelfth street, and is also extended westerly beyond Twelfth street on the lands of said defendant; that the depot of the said defendant is situated a few hundred feet above Twelfth street; that the lots of said city at that place are laid out and numbered, in the plat of the town, so as to be of the width of fifty feet each on Front street, and running back from said Front street, south or southerly to a depth of 140 feet, to an alley which runs throughout the whole of the block parallel to Front street, and at right angles to said Twelfth street; that at the date of the construction of said defendant's road, in 1881, the said plaintiff was the owner of lots 5 and 6, in block 42, in said town of Boulder; that said lots are situate upon the northwest corner of block No. 42, (and are) each of the width of fifty feet on Front street, with a depth of one hundred and forty feet, to an alley; and that said lots lying on a corner, the depth of the outside lot is along, and forms the boundary to said

Twelfth street for its entire depth, 140 feet, so that, while the lots are laid out and numbered and referred to as situate on Front street, yet the whole depth of one of these lots runs along and is situate on east side of Twelfth street; that at the time the road was constructed there was, and ever since has been, thereon a two story brick dwelling house of 16 rooms, fronting upon said Twelfth street, and situate upon the south half of lots 5 and 6, running east and west; that, in constructing its side-track or switch, as before stated, defendant placed the same at a distance of about 28 feet south of the line of said plaintiff's property, and that between said plaintiff's line and the lot of the said defendant, upon which its side-track is situate, is an alley twenty feet in width, and the same heretofore referred to as running through the entire block 42, the defendant's track being, at the place where it crosses Twelfth street, and the northerly rail thereof, about eight feet south of the north boundary of the lot owned by the defendant, and twenty-eight feet south of the south line of plaintiff's lot on said alley; that, in the use of its side-track and switch, the defendant uses it to switch cars across Twelfth street, which causes obstruction to the streets, and thus renders said plaintiff's property less valuable; and that he has thus suffered damages. There is no claim that defendant has been guilty of negligence in operating its side-track, but the damages claimed are for the usual and ordinary operation of said side-track, and not for anything special or unusual in thus operating its side-track. It is further agreed that defendant has also been allowed and licensed by the said town of Boulder to run across Twelfth street, both with its main track and with said side-track, but that plaintiff was never asked for and never did consent to the laying down of said track across said Twelfth street." By another stipulation it was agreed what the damages should be, in case the court, under the law and upon the facts set forth in the agreed statement, should find that the plaintiff has a cause of action for more than nominal damages; right of appeal being reserved to either party. The finding and judgment of the court were in favor of defendant. Plaintiff appeals, under the act of 1885.

R. H. Whitely for appellant.

Teller & Orahood for appellee.

ELLIOTT, J.—The matters requiring consideration in this case appear somewhat complicated at first, though they are really quite simple. In general terms, they may be stated thus: A railroad company lawfully constructs and operates its road, without negligence, in the immediate vicinity of private real property, but with-

Question involved.

out touching the same. It builds and operates the road across a public street upon which such real property is situate, though not in front of the same, and thereby causes obstruction to the street by passing trains, and thus renders such property less valuable. Under such circumstances, has the owner of the property a cause of action against the railroad company for the damages thus occasioned?

Before considering the legal aspects of this question, let us take a further survey of the premises. The main line of defendant's road runs through Water street, about 200 feet distant from the plaintiff's property. Between the main line and plaintiff's property lies the south half of block 42, which is the private property of defendant, through which defendant's side track runs. Plaintiff's property consists of a piece of land 140 feet in length by 100 feet in width, situate in the north half of block 42, being the northwest corner of said block, and is bounded on the north by Front street, on the west by Twelfth street, and on the south by the alley separating the north half of block 42 from the south half. The streets are 80 feet in width, and the alley 20 feet. Plaintiff's house is situate upon his premises adjoining the alley, and fronts on Twelfth street. The main line of defendant's road and also the side track across Twelfth street; the former 200 feet south of plaintiff's premises, and the latter 28 feet south. From this it appears that the streets and the alley bordering on plaintiff's premises, and by which he gains access thereto, are entirely unobstructed. The *corpus* of his property is not affected by any physical contact with the railroad tracks, nor is any street or alley, so far as the same borders on his premises, in any way interfered with. Twelfth street and the alley, so far as plaintiff's property abuts upon them, are entirely unobstructed, and Front street is entirely untouched by the railroad. It is true, when plaintiff goes southward on Twelfth street, he encounters the side track at a short distance from his house, and the main line a little further on; but in this respect he is affected in the same manner only as the general public. It does not appear that his use of Twelfth street to the southward of his premises is other or different than that of the general public. He may or may not use the street more frequently in that direction than other people; but that is not the test. One traveller has no more legal ground of complaint on account of an obstruction in the public highway than others, unless he be entitled to use the highway at the point of such obstruction for a different purpose than other people, or has suffered some special injury therefrom. The fact that he may be more frequently inconvenienced thereby does not give a cause of action. From

Situation of
premises.

the agreed statement of facts upon which this cause was tried it appears that the damage suffered by plaintiff on account of the proximity of defendant's side track and main line arises solely from the obstruction to Twelfth street caused by passing trains. No other kind of damage is specified, and we are not at liberty to infer or surmise other or different kind of damage. It is clear that in the matter of such obstruction he suffers only in common with the general public. His damage, therefore, may or may not differ in degree. It certainly does not differ in kind from that of the general public. It must not be understood from the foregoing that physical contact with the *corpus* of the property is a necessary condition precedent to an action for damages.

The constitution of Colorado, art. 11, § 15, provides "that private property shall not be taken or damaged for public or private use without just compensation." It is admitted that the use of defendant's side track for switching cars across Twelfth street causes an obstruction to the street, renders plaintiff's property less valuable, and that plaintiff has thus suffered damages. Hence it is claimed with much confidence that by this admission the plaintiff's cause of action is established. Let us examine this claim. The constitutional provision above quoted has already received the careful consideration of this court, and has been clearly construed in its application to certain facts and circumstances; but the determination of this case will require its further consideration and construction.

Private property must be taken, or private property must be damaged, before a cause of action arises. The damage must be to the property, or its appurtenances, or it must affect some right or interest which the owner enjoys in connection with the property, and which is not shared with or enjoyed by the public generally. It is insisted, however, that by the wording of the agreed statement the real property belonging to plaintiff, as described therein, is admitted to be damaged, in that it is rendered less valuable by defendant's use of Twelfth street for railroad purposes. Even this admission is not sufficient, of itself, to give a complete cause of action. The fair import of the agreed statement is that the damages which the plaintiff suffers are all referable to the obstruction in Twelfth street. While it is admitted that plaintiff's property is rendered less valuable by reason of such obstruction, yet, to bring the case within the meaning of the constitution, it must also appear that he has some special private property right or interest, as a private right of way or user, in Twelfth street, at the point of obstruction, other or different from the right or interest of the general public, and that such property

Right to compensation for consequential damages.

right or interest of plaintiff has been damaged for public use. Notwithstanding the broad terms of our constitution, and the unqualified expressions of certain judicial opinions, we are not prepared to say that whenever a depreciation in private property is caused by some public or private improvement the owner of the property thus depreciated may recover compensation against the party making such improvement. It is probable that in consequence of every improvement resulting from new inventions or discoveries the private property rights or interests of some person or persons have been damaged or injuriously affected. In many instances the construction and operation of railroads have driven stage companies and post-chaises out of existence, and rendered the property invested therein, as well as such business, comparatively valueless.

It is sometimes asserted that railroads are an advantage to large places, but a disadvantage to small ones. Undoubtedly, a small village may be seriously injured by the construction and operation of a railroad in its vicinity, provided it does not come near enough for the convenience of trade and travel by its inhabitants. We are not aware, however, that it has ever been contended in such cases that the proprietors of such stage routes, or the property owners in such villages, have a cause of action against the railroad companies for the depreciation of their property. It may be susceptible of demonstration that every railroad company running its trains across a street or public highway causes damage or inconvenience in a greater or less degree to every traveler having occasion to use the street or highway at the point of such crossing, as well as to every person owning or occupying real estate anywhere in the vicinity of such crossing; and yet there is no remedy for such damage, under ordinary circumstances, for the reason that as a general rule no one has any special, private property or interest in the public highway other or different from the general public, and the damage thus suffered is common to all having occasion to use the street or highway. In such case, therefore, private property cannot be said to be taken or damaged for public use, within the sense or meaning of the constitution. It is only when some specific private property, or some right or interest therein or incident thereto, peculiar to the owner, is taken or damaged for public or private use that the constitution guaranties compensation therefor. *City of Denver v. Bayer*, 7 Colo. 113, 2 Am. & Eng. Corp. Cas. 465; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *Whitsett v. Union Depot & R. Co.*, 10 Colo. 243; *Rude v. City of St. Louis*, 93 Mo. 408; *Morgan v. Des Moines & St. L. R. Co.*, 64 Iowa 589, 20 Am. & Eng. R. Cas. 67; *Shaubut v. St. Paul & S. C. R. Co.*, 21 Minn. 502.

These views are in harmony with those expressed upon the question considered in *City of Denver v. Bayer*, *supra*. In that case it was held that the owner of property abutting on a public street had a special property, an easement in the street in front of or adjacent to his own property, for the purpose of ingress and egress to and from such property; that for such purposes he had a peculiar interest in the street different from that of his neighbors or the general public; and that, if such easement were taken or damaged for public or private use, it was a taking or damaging of his property, within the meaning of the constitution, for which he was entitled to just compensation. In this case it is not shown that the obstruction was at a place affecting the ingress or egress to or from plaintiff's property. Certainly, it cannot be maintained that every person owning property abutting upon a street or public highway has a special property in such street or highway, throughout its whole extent, other or different from his neighbors, or the general public, on the ground that it is an easement by which access is gained to his private property. Such was not the purport of the decision in the *Bayer* case, and such cannot be the meaning of the constitution.

In the case of *Jackson v. Kiel*, *ante*, p. 297, (decided at this term,) the property was held to be damaged by a railroad crossing 132 feet distant; but the property in that case was situate on a *cul-de-sac*, and the occupation of the street for railroad purposes was such as to completely cut off access to the property by means of vehicles; yet in that case Chief Justice HELM was careful to say that the owner "could not recover for any general inconvenience, thus occasioned, which he may have suffered in common with the general public; but for the special and peculiar injury shown in this case he was doubtless entitled to compensation."

Counsel for appellant asks us to follow the case of *Rigney v. City of Chicago*, 102 Ill. 80, in which the supreme court of that state, construing a constitutional provision similar to ours, say: "In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage, with respect to his property, in excess of that sustained by the public generally." We cannot see that the application of this rule to the facts before us will save the plaintiff's case. In the first place, wherein has it been made to appear that the obstruction resulting from the railroad crossing causes any

City of Denver v. Bayer.

Jackson v. Kiel.

Rigney v. City of Chicago.

direct, physical disturbance of a right which the plaintiff enjoys in connection with his property? The right to use and enjoy Twelfth street is a right belonging to him without connection with his property, without reference to his property. It is a right which he shares in common with the highest and humblest of his fellow citizens, without regard to any other right, interest, or property which he may possess. As we have seen, nowhere in the agreed statement does it appear that plaintiff makes any special use of Twelfth street at the point of the railroad crossing, either in connection with his property or for any other purpose. How, then, can the disturbance of his right to the use of Twelfth street cause him to sustain special damage with respect to his property? For aught that appears, any inhabitant of the town, though not having property on Twelfth street, may use the street at the point of the crossing as much as the plaintiff, and thus suffers as much damage by means of the obstruction. So it is evident that the damage caused to plaintiff by the obstruction is not special, but general, or such damage as he suffers in common with the general public, who may or may not own property on Twelfth street, in the vicinity of the crossing. Plaintiff's damage, as before stated, may differ in degree, but not in kind. It is therefore not special in the proper sense of that term. But it is insisted that the rule allows a recovery when the damage is merely in excess of that sustained by the public generally. Giving the rule this broad interpretation, it avails plaintiff nothing in this case; for, as we have seen, it does not appear by the agreed statement that plaintiff's damage exceeds in any degree that of the public generally. But this is not our construction of the rule in the Rigney case. Considering the facts of that case in the light of the whole opinion, and in connection with the entire rule, as above quoted, we are of the opinion that the clause in which the word "excess" appears must be construed as meaning damage different in kind from that sustained by the public generally. To hold that damage may be recovered when the difference is in degree merely, would lead to difficulties practically insurmountable. It would necessitate determining the damage sustained by the public generally as a basis upon which to calculate the excess sustained by the plaintiff. This in turn, would involve a variety of troublesome questions. For example, who are to be considered the "general public," in such cases? Are they the people who own real property in the vicinity, or those who do not? Are they those who live near, or those who live remote from, the crossing? Or are they those who have neither property nor residence in the vicinity? None of these difficulties can

Special damage.

arise under the rule as expressed in this and the former opinions of this court.

An analysis of other cases relied on by counsel for appellant will show that they are clearly distinguishable from the present case, though it must be admitted that the constitutional provision under consideration has, in some states where it exists, received a construction somewhat variant from the views expressed in this opinion. Nevertheless, we think, upon principle as well as by the better authorities, we have given a consistent and reasonable construction to the language of our constitution—a construction capable of definite application, and which, as a general rule, is calculated to secure substantial justice, without involving litigants in unnecessary difficulties respecting their legal rights and liabilities. The judgment of the district court is affirmed

MCQUAID

v.

PORTLAND & V. R. CO.

(Oregon Supreme Court, December 10, 1889.)

Streets—Title to Fee—Compensation for Construction of Railroad.—In a conveyance of land bounded by a public road or street, the grantee ordinarily takes a legal title to the centre thereof, subject to the rights of the public therein; but he does not thereby secure such a title to the land embraced in the road or street as will enable him to claim compensation from a railway corporation which locates and operates its road thereon, under an appropriation of the same authorized by sections 3242, 3243, tit. 2, c. 32, Hill, Code Or., or by any similar statute.

Same—Right to Compensation—Interference with Access.—Whether an owner of land which abuts upon a public road or street can maintain an action for damages against a railway corporation for locating, constructing, and operating its road thereon, under an appropriation thereof authorized by such statute, does not depend upon his ownership of the fee to the land included in the public road or street, but upon the fact as to whether the location and operation of the railway destroys or materially interferes with his access to his premises.

Same—Interest of Lot Owner in Street for Purposes of Access.—An owner of real property has a right to the use of the public road or street upon which it abuts, for the purposes of ingress and egress to and from the same.

Same—Right Appurtenant to Property.—This right is appurtenant to his premises, and constitutes such a property interest that it cannot be taken away or seriously impaired, against his will, for any purpose, without payment of just compensation therefor.

Same—Nature of Occupation by Railroad.—Where a railway corporation locates and constructs its road upon a public highway under an appropriation thereof authorized by the statute referred to, its occupation of the highway is a kind of sufferance.

Same—Right to Change Grade—Exclusive Use.—It is permitted to appropriate so much of the highway as may be necessary or convenient for such purpose, but the use thereof by the public is not thereby restricted. The railway corporation is allowed to build and operate its road upon the highway, but it has no authority to change the grade thereof, or use it to the exclusion of the public, or in such a manner as will infringe upon the rights of adjoining property owners to its use.

Same—Ordinary Inconveniences.—The latter are compelled to submit to ordinary inconveniences and annoyances which the operation of a railway located upon a public road occasions; but they cannot be deprived of the rights of ingress and egress to and from their premises, without their consent.

Same—Obstruction of Access to Property.—Where a railway corporation locates its road, under the provisions of such a statute, in such close proximity to the premises of an adjoining lot-owner that its use obstructs his communication with the street, and interferes with its enjoyment by those who occupy the premises to such an extent as to materially depreciate their value, the lot-owner is entitled to recover the amount of such depreciation.

Same—Obstruction—Question for Jury.—In an action against a railway corporation to recover damages in consequence of its locating and constructing its road upon certain streets in a certain city, it was alleged in the complaint that the plaintiff was the owner of premises at the corner of two of the streets; that the defendant had located its road above the grade thereof, and made a large curve in its road; had built it so near the plaintiff's premises that a wagon could not pass between the curb of the sidewalk and its road; that it had so taken and appropriated such part of the streets at the corners of plaintiff's premises as to interrupt and greatly obstruct access thereto; and, it appearing that evidence was introduced upon the part of the plaintiff, at the trial of the said action, tending to prove the truth of said allegations, *held*, that it was the duty of the trial court to have submitted to the jury the question as to whether the location and operation of the defendant's road interfered with the plaintiff's ingress and egress to and from his premises, so as to depreciate the value thereof.

Same—Measure of Damages.—*Held, further*, that the plaintiff was entitled to recover damages for the amount of any depreciation in the value of his premises caused by the defendant in locating, conducting, and operating its railroad so near them as to prevent or materially affect access thereto by the plaintiff, or those occupying said premises, if found that they had suffered depreciation from such cause.

APPEAL from Circuit Court, Multnomah County :

The appellant commenced an action against the respondent, a private corporation formed under the laws of the state, to recover damages caused by its constructing and operating a railway in certain streets in the city of East Portland. He alleged in his complaint, that he was owner in fee of lots 7 and 8, block 67, situated at the southwest corner of Third and E streets, in said city, including 100 feet square, fronting and abutting upon said streets; and that his ownership thereof extended to the centre of the part of said streets

upon which his said lots so fronted and abutted, subject to the public easement therein. That the respondent constructed a railroad in said city extending from the intersection of N and Water streets north, along Water street, to J Street; thence east, up J street, to Third street; thence north, along Third street, to said E street; thence east, along said latter street, to Fourth street; and thence north, along Fourth street, to its northern termination. That in constructing said railroad, the respondent unlawfully, and without the license or consent of appellant, and against his protest, and without making compensation to him for taking said streets, took and occupied the portion of said Third street owned by appellant as aforesaid, and constructed its railroad thereon a distance of 100 feet in front of appellant. That, in constructing said railroad in said portion of Third street, the respondent, negligently and willfully, built the railroad above the grade of the street the whole distance of the 100 feet, and made a large curve in its road at that point; building its road so near the curb of said lots that a wagon cannot pass between it and the railroad. That respondent wrongfully and unlawfully constructed the railroad on E street, between Third and Fourth, in the form of a reverse curve or letter S. That the portion of Third and E streets upon which the said lots fronted had been improved by appellant at a cost of \$165. That respondent had since September 20, 1888, been operating said railroad, carrying freight and passengers thereon, and has since said date and is now using, in operating the road, an old and defective locomotive, also a cheap and badly constructed locomotive engine, which is housed in, and a falsely called "steam-moter," which is propelled along said streets, over its said road. That said locomotives, in propelling the cars on the railroad, emit large quantities of steam, smoke, and cinders, make loud noises, which annoy the appellant, and disturb him, so as to injure his peaceful and quiet possession of said property; and respondent has taken and appropriated said part of said street, thereby interrupting and obstructing his access to his said lots, and has almost driven travel off said streets. That, in consequence thereof, the respondent has rendered the appellant's said lots of less value and damaged him in the full sum of \$3,000. The respondent, for answer to the said complaint, denied the alleged negligence in the construction of its road, or that it was above grade, or had a reverse curve, or that it retarded access to the appellant's lots, or that it used the alleged character of engines; denied the alleged ownership of appellant in the fee of the street; alleged that the road was constructed in pursuance of authority granted by the common council of the

city of East Portland; denied that it was intended or suitable for, or operated for, the conduct of a general freight business, but alleged that it was only operated for the local passenger business along the streets of East Portland, and contiguous towns, and for such business as is usually carried on by cable or horse-car lines of street railways. The respondent further alleged that the town of East Portland was platted in 1865, and the streets thereof dedicated to public use, by James B. Stephens, who was then the owner of the land, and that at the time of such dedication the General Laws of Oregon made such streets subject to use for the construction and operation of railroads: and it denied that appellant had been damaged. A reply was filed, denying ~~fall~~ all the allegations of new matter alleged in the answer. The case was tried in the circuit court by the jury, who returned a verdict in favor of the defendant, upon which verdict the judgment appealed from was entered. The appellant assigned a number of grounds of error, relied upon on the appeal, which are noticed in the points of the respective counsel, and referred to in the opinion of the court herein.

E. O. Doud and R. Williams for appellant.

C. B. Bellinger for respondent.

THAYER, C. J.—The principal question to be determined in this case is whether the appellant was entitled to recover damages from the respondent in consequence of its building and operating the street railway complained of, under the circumstances and in the manner in which it was constructed and used. There seems to be two views upon the subject, either of which is sustained by numerous precedents and authorities, although they widely differ. One of these views is that a lot-owner in a town or city has a private property interest in the street in front of his lot, and that the appropriation of the street, under such circumstances as claimed in this case, deprives him of his property, and entitles him, under the constitution of the state, to compensation therefor. The other view is that the street belongs to the public; that the latter owns it for all the purposes of a thoroughfare, and can use it, for such purpose, in any manner best calculated to subserve public needs and requirements; and that the lot-owner has no right or interest in any part of the street, except in common with the other members of the community. Either of these theories can be maintained by a long list of decisions of courts of the highest standing, and by very cogent reasons; but each of them, when strictly carried out, results in hardships and frequent injustice. The maintenance of the

Compensation
for construction
of railway—Oppos-
ing views.

theory that the lot-owner has a private property in the street, which must be condemned and paid for before the railway can be built, would practically prevent the establishment of such a means of transportation, and be liable to operate injuriously to the public. Upon the other hand, if it should be held that the lot-owner has no private interest in the street, and a railroad track can be laid, and a steam-engine and cars be used thereon, so as to materially interfere with the right of the lot-owner to egress and ingress, it would be an injustice.

The two principal tests which have been applied in order to determine a liability or non-liability in such cases are—

**Tests applied
to determine
liability.**

First, as to whom the fee in the street belongs; and *second*, whether the appropriation of it by a private railway company, in order to transport passengers, is a new use or servitude, or is consistent with the general purposes for which the street was established. Too much importance, it seems to me, has been attached to the question of ownership of the fee in the street. When a street has been dedicated to the public, or land been taken for a street under the law of eminent domain, the inquiry as to whom the fee is in is not very material. Its being in the public is a pure fiction. The public may have an irrevocable right to the use of the street; but how can it acquire the fee to the land? The fee must vest in some one having a legal capacity to take it. It must be a natural or artificial person,—must be some one having a legal entity. The declaration that the fee in such case is in the public, meaning the general mass of the people, without regard to any legal organization, although often made use of, is to my mind absolutely absurd. The public, as a mass, does not, in my opinion, possess any such capacity. Nor is it important, in such a case, that the fee to the land is in the owner of the lot, unless he can maintain that the use of it by the railway company is a new use,—an additional burden upon the land from that contemplated by the dedication.

The fee to the land constituting the street is generally conveyed to the adjacent lot-owners, in the conveyance to them of the lots. *Hammond v. McLachlan*, 1 Sandf. N.

**Title to fee of
street.**

Y. 323, is a leading case upon that subject, and, so far as I have been able to discover, has been followed by the latter adjudications of the New York courts. *Perrin v. New York Cent. R. Co.*, 36 N. Y. 120; *Sherman v. McKeon*, 38 N. Y. 266. The question as to whether a deed to a lot conveys to the center of the street depends, of course, upon its construction. It may limit the conveyance to the exterior line or edge of it, though, ordinarily, it extends *ad medium filum viæ*. It must, it seems to me, be held that the

fee is either in the adjacent lot-owners or remains in the dedicators. I do not think that it can be maintained that it passes to the public, either by contract or by any existing statutory authority. When a land proprietor lays out a town upon his land, he first surveys it into blocks, lots, streets, etc., and then makes and files a plat thereof. Thus far he has created no obligation; but, whenever he sells one of the lots by reference to such plat, he impliedly covenants that the street upon which it abuts shall forever remain open, for the lot-owner's accommodation. But the public then acquire no interest in the streets in the town, and will not, until they accept the dedication. The lot-owner's interest attaches long before the rights of the public arise. The former secures his right by a deed; and, because the public thereafter accept the dedication, it does not follow that the lot-owner is thereby deprived of those rights. The statute might, no doubt, provide that when a plat shall be so made and filed for record the legal title to the streets shall vest in some one who has legal capacity to take, to hold the same in trust, for the purposes of the dedication; and, if the general public has such a capacity it could have provided that such title should vest in the public. The statute, however, has made no such provision. It has provided (section 4180, Hill, Code) that "every donation or grant to the public, including streets and alleys, or to any individual or individuals, etc., marked or noted as such on the plat of the town wherein such donation or grant may have been made, shall be considered, to all intents and purposes, as a general warranty to the said donee or donees, grantee or grantees, for his, her, or their use, for the purposes intended by the donor or donors, grantor or grantors, as aforesaid." This section of the statute creates a covenant that the donee or grantee shall enjoy the use of the property for the purposes intended by the donor or grantor. It does not, however, attempt to vest the legal title in the former, nor, as I can discover, add any force or strength to a dedication which it did not possess at common law. The warranty does not become operative or binding until there has been an acceptance of the use. It then renders the dedication irrevocable, which would as effectually be the case if there were no warranty.

But in whomsoever the fee to the land constituting the street may be is not, to my notion, very important, in a case like the one under consideration. The use of the land as a street includes, practically, its entire beneficial interest. There is no estate of a private character left in the dedicator, if the fee does remain in him, which he can utilize, and, if it vests in the lot-owner by virtue

Title to fee
immaterial.

of his deed to the lot, it confers no rights which are not secured to him by the implied covenant, arising out of the conveyance, that he shall have a right of way over the street, and egress and ingress to and from his premises by means thereof. The lot-owner's rights in the street are just as sacred, so far as I can see, in the one case as in the other.

The more important question for consideration is how far a street can be appropriated by a railway company regardless of the rights of a lot-owner; and its solution, to my mind, involves the main difficulty in this class of cases. Our statute (title 2, chap. 32, Hill, Code) has undertaken to provide the means in which a public road, street, or alley, or public grounds, may be appropriated. Section 3242 thereof authorizes a corporation organized for the construction of any railway, etc., whenever it shall be necessary or convenient, in the location of its road, to appropriate any such public road, etc., to appropriate so much thereof as may be necessary or convenient in the location and construction of its road; and it authorizes the county court of the county wherein such public road, etc., may be, unless within the corporate limits of a municipal corporation, to agree with the corporation constructing the road upon the extent, terms and conditions upon which the same may be appropriated, or used and occupied, by such corporation. And section 3243 thereof provides, in effect, that if the public highway or grounds be within the limits of any town, whether incorporated or not, that such corporation shall locate its road upon such particular road, street, or alley, or public grounds within such town, as the local authorities mentioned in the last section, (referring to section 3242,) and having charge thereof, shall designate. The two sections, however, respectively provide,—the former one, that, if such county court and corporation shall be unable to agree upon the extent, terms and conditions upon which the public road, etc., may be appropriated, etc., such corporation may appropriate so much thereof as may be necessary and convenient in the location and construction of its road; and the latter one, that if such local authorities shall fail or refuse to designate the particular road, etc., upon which such corporation shall locate its road, within a reasonable time, when requested, the corporation may make such appropriation without reference thereto. These provisions of the statute are ambiguous, unsatisfactory and absurd; and about all that can be gathered from them is that they authorize the appropriation by a railway corporation of so much of a public road or street as may be necessary and convenient in the location and construction of its road.

Oregon statute relative to appropriation of streets for railways.

The appropriation, however, is only of a part of the easement or use secured to the public in the land embraced within the public road or street. The legislative jurisdiction in such matters is limited to a control of the use which belongs to the public, and it should not be presumed that the legislature intended to exercise it in violation of private rights and interests. It authorizes the appropriation of the part of the public road or street as such, and amounts to no more than a partial change of the manner of its use. It does not attempt to interfere with the private rights of the owners of the land abutting upon the road or street; and I doubt very much whether the legislature has the legal right, by such an act, to destroy or seriously impair rights of that character. They are virtually private property, and cannot be taken by a railway corporation without compensation being first made or secured in such manner as may be prescribed by law. Article 11, § 4, Const. Or.

I do not regard the occupation of a public highway by a railway corporation, under the appropriation authorized by the statute in question, as anything more than a kind of sufferance. The railway corporation is permitted by the statute to appropriate so much of the highway as may be necessary or convenient in the location and construction of its road; but the use thereof by the public is not abridged. It is simply extended to the railway corporation, and the latter admitted to its enjoyment in common with the former. The corporation is allowed, under the statute, to build and operate its railway within the bounds of the highway; but it has no authority to change the grade thereof, or to use it to the exclusion of the public. Nor has it any right to use the highway in such a manner as will cut off access to it by the adjoining lot-owner. The latter will, doubtless, be obliged to submit to the ordinary inconveniences and consequences which the construction of a railroad track, and the moving of a locomotive and cars thereon, occasion,—be compelled to endure the smoke, noise and screeching which naturally result from the use of that character of vehicles; but they cannot be deprived of the rights of ingress and egress, to and from their premises, without compensation. This class of cases is unlike, in principle, the class in which adjacent lot-owners are denied the right to recover damages for a loss or inconvenience resulting from an improvement of streets by the public authorities having charge of such matters. In the latter case, the authorities have an undoubted right to alter or establish the grade of streets in towns or cities, and to cause the improvement of the streets to be made according

Nature of occupation authorized.

to the standard of such grade, without creating any liability in consequence thereof. But the improvement is made in order to render the street useful and convenient to the public; and, if the work is done properly, the lot-owners, although they may suffer incidental damages thereby, have no legal grounds for complaint.

The use of a street by a railway corporation, under such an authority as herein referred to, is, however, primarily for its own advantage. Its occupation of the street is the same as of any other beneficiary of its use, and is subordinate to the authority of those in whom the law vests the management and control of the street. Its right to so locate and construct its road is restricted to such a use of the street as will not destroy or materially impair the rights of others to its use and enjoyment.

It is contended that a public road or street is not established for the purpose of being used by a railroad corporation, but is designed for the mode of travel ordinarily pursued along such thoroughfares, and that its use by the former imposes a new burden upon the land embraced within it. The statute to which reference has been made is of long standing and contains the only provision which authorizes a railway corporation to appropriate, *ex omine*, a part of the public highway for the location and construction of its road. The authority of the statute has been invoked and applied in every instance in which a railroad has been located and constructed across or along a highway in this state, and has never been questioned. To determine, therefore, at this late date, that it is practically a nullity, as we necessarily would be compelled to do if we indorsed the position of the learned counsel for the appellant, would operate injuriously to the community.

I am aware that the construction of the said statute indicated herein does not accord with that given to similar statutes by courts of acknowledged ability of other

**Williams v.
New York
Cent. R. Co.**

states. In *Williams v. New York Cent. R. Co.*, 16 N. Y. 97, a leading case upon the subject, it was held that the owner of a fee in a public highway might maintain an action against a railroad company which, without his consent, or the appraisal of his damages, had entered upon and occupied such highway with the track of its road, holding that the appropriation of the highway by the company was a "taking" of the property of the owner of the fee, within the meaning of the constitutional provision upon that subject and that the conversion of a highway into a railroad track was a material change from the use for which it was originally intended. The opinion of the

court in that case was delivered by a jurist who has had few equals in learning and ability, and for whose wisdom I entertain the highest regard. The opinion was supported by authority of great weight, and sustained by clear and cogent reasoning; but, notwithstanding, I am satisfied that time and experience have shown that the rule there laid down was not the best suited to the needs and requirements of the community. I think, with all due deference to the name of Judge SAMUEL L. SELDEN, that it would have been better to have held that the location and construction of a railway track by a railway corporation in a public highway, under a special permission granted by the legislature, was not necessarily a violation of the rights of the owner of the fee to the land, or that it put the land to a use foreign to that contemplated in the establishment of the highway; that such was not so inconsistent with the principal use as to constitute a taking of the land, within the meaning of the constitutional provision referred to, unless it cut off or seriously impaired, rights belonging to parties by virtue of their relations to the land as such highway. Such a holding would have been more conservative, it seems to me, although made at the sacrifice of refined logic. The legal title to the land in a public road or street is more in name than in substance. It exists mainly in theory, and cannot be rendered available to the owner, except in case the road or street is discontinued as such, which is a remote contingency. The use of a public highway by a railway corporation under the appropriation authorized by said statute is, in my opinion, a legitimate use of it, when it does not infringe upon the adjoining land-owner's right of access to the highway; but, when it materially interferes with such right, the land-owner can maintain an action against the corporation for damages for the depreciation caused thereby to his land.

The counsel for the respondent claims that the railway track in question was located upon the streets in the city of East Portland designated by the city council thereof, and that it was rendered necessary thereby, in its construction to make curves in the track, in order to pass around corners, which brought the track nearer to the premises of the appellant than it would otherwise have been located. This was the respondent's misfortune, and could not be pleaded as a justification for intruding upon the appellant's right to the use of the street in front of his premises. The city council had no power to make any directions in that respect, except what is vested in it by the said statute, which, as before suggested

Obstruction
of access by
curve in
track.

was not intended by the legislature to authorize a direct interference with the rights of lot-owners above referred to; nor had the legislature itself any such power, without providing for the payment of compensation. If the respondent could not locate and construct its roads upon the streets designated by the common council of the city, without affecting the rights of some of the adjoining lot-owners, it should not have attempted the appropriation without the consent of such lot-owner. It was not compelled to use the streets of the city for its railway track, nor was it justified in so doing without due authority.

There are many items of damages alleged in the complaint which cannot be recovered in the action; but if the location

**Interference
with enjoy-
ment of prem-
ises—Measure
of damages.**

of the railway is in such close proximity to the appellant's premises that its use obstructs communication with the street, and interferes with the enjoyment of it by those who may occupy the premises, to such an extent as to materially depreciate their value, the appellant should be entitled

the amount of such depreciation. The circuit court should have referred that question to the jury, with instructions that if they found the facts as above suggested they should find for the appellant, and assess his damages in accordance with the rule there indicated. The complaint in the action was not strictly framed according to the theory of the case as herein laid down; but it is broad enough, in its allegation of facts, to meet that view. I do not think that the action was based wholly upon the claim that the placing of the railroad upon the street, of itself, gave a right to damages for the appropriation of property. The complaint contains the allegation "that, in constructing the said road on said portion of Third street abutting on said lots, the respondent negligently and willfully built it above the grade of said street for the whole hundred feet, and made a large curve in its road on that portion of Third street, and built its road so near the curb of appellant's lots that a wagon cannot pass between the curb and the railroad." This allegation is followed by the allegation "that the respondent, through and by building its road on said street as aforesaid, has so taken and appropriated said part of Third street so owned as aforesaid by appellant, and also said portion of E street, between Third and Fourth, as to interrupt and greatly obstruct access to appellant's said lots, in so much as to have almost driven travel off of said street," etc. These allegations present the identical question considered; and the circuit court committed error in its holding that the action was based upon the claim that the placing of the railroad upon a street gives a right to dam-

ages for appropriation of property; that there could be no recovery on the part of the appellant for that single cause of action, for the fact of placing a railroad upon the public street; that he could not recover in the action for the extraordinary use of the streets; that if there was any extraordinary use of it, or any extraordinary results from the operation of the road, and the city of East Portland authorized the road to be put down upon the streets and operated, the appellant could not recover. This, in substance, was one of the instructions given by the court to the jury to which exceptions were taken; and it is very evident, from an examination of the complaint, that the court put too narrow a construction upon it.

The instruction was also faulty in another respect. The court left it to the jury to find whether the city of East Portland authorized the respondent to locate and operate its road on and along said streets. The evidence as to what the city did to authorize the respondent to so locate and operate its road was in writing; was in the form of an authenticated copy of a city ordinance; and it belonged to the court, and not to the jury, to determine its effect. Besides, the instruction assumed that the city of East Portland had power to authorize the respondent to locate and operate its road at the place and in the manner in which it was done. The charter of said city, I find, does empower the common council thereof to "permit, allow, and regulate the laying down of tracks for street cars and other railroads upon such streets as the council may designate;" and that may have empowered it to authorize the respondent to locate and operate its road at the place where it was constructed. But whether it did so or not depends upon whether it trenches upon the rights of the appellant in the respect hereinbefore mentioned. This presented a question of fact which the court should have submitted to the jury. The respondent could only have obtained from the common council of the city authority to locate and construct its road upon the streets in such a manner as not necessarily to interfere with the rights of others to their use. A railway corporation authorized to use a public street for the purposes of its road, under such a power, is required to locate and construct it so as to leave sufficient space on either side to allow the passage of wagons between its track and the curb of the sidewalk. It has no right to veer from side to side, and interrupt the enjoyment of the street by adjoining lot-owners, in front of their premises. Such a course should subject the corporation to damages in favor of the lot-owner so encroached upon. In *Cadle v. Muscatine W. R. Co.*, 44 Iowa, 11, the liability of the company for such

an encroachment was maintained upon the ground of carelessness on the part of the company in the location of its road. The court there held that the owner of adjacent property had an interest in the street entitling him to maintain an action against the company for such a careless or unlawful appropriation thereof, or location of its track thereon, as should be injurious to his property notwithstanding the city of Muscatine had granted to the company authority to construct its road over such street. The court said: "It was competent for the city of Muscatine to grant to the railroad company authority to construct its road over the street in controversy; and for a proper exercise of such authority the defendant would not be liable, although such act might diminish plaintiff's enjoyment of his property, and lessen its value." I think the principles of that decision, so far as they recognize the mutual rights of the public and of the adjoining land-owners in public highways, and the authority of the legislature to exercise reasonable control over such highways, are correct. But I maintain, further, that the rights of such adjoining land-owners in a part of the adjacent highway sufficient for the reasonable enjoyment of their premises constitute in them a property interest, whether they own the fee to the centre of the highway, or merely an easement therein; that in either case it is a proprietary right, which they purchased with the premises, as appurtenant thereto, and which they cannot be deprived of, except by the same power, and upon the same terms, by which they may be deprived of any other property; and that the grounds of liability of a railway corporation for an encroachment upon those rights, under an attempted appropriation of the highway, is not carelessness or negligence in the location of its road, but a wrongful usurpation, which no legislative power can sanction, under the constitution of the state, without providing for just compensation.

Under the view herein expressed, the judgment appealed from must be reversed, and the case remanded to the circuit court for a new trial.

Construction of Railroad in Street—Right of Abutting Lot Owners to Compensation.—See *Iron Mountain R. Co. v. Bingham* (Tenn.), 38 Am. & Eng. R. Cas. 444, note 452; *Reichert v. St. Louis & S. F. R. Co.* (Ark.), 38 *Ib.* 453; *Theobald v. Louisville N. O. & F. R. Co.*, (Miss.), 38 *Ib.* 462; *Pennsylvania Schuylkill Val. R. Co. v. Walsh* (Pa.), 38 *Ib.* 466, note 468; *Smith v. East End Street R. Co.* (Tenn.), 38 *Ib.* 470; *Arbenz v. Wheeling & H. R. Co.* (W. Va.), *ante*, p. 284; *Griffin v. Shreveport & A. R. Co.* (La.), *ante*, p. 295; *Jackson v. Kiel* (Colo.), *ante*, p. 297; *Gilbert v. Greeley, Salt Lake & Pac. R. Co.* (Colo.), *ante*, p. 300.

PAQUET

v.

MOUNT TABOR STREET R. CO.

(Oregon Supreme Court, December 10, 1889.)

Eminent Domain—Construction of Railroad in Street—Injunction.—A railway corporation authorized to locate, construct, and operate its road upon a street in an incorporated city, by authority of the common council thereof, granted in accordance with the charter of the city, or upon a county road in the country, under an agreement with the county court of the county in which the road is situated, in accordance with section 3242, Ann. Laws Or., cannot be enjoined from proceeding with its enterprise at the suit of an owner of lands abutting upon the street and county road, whether the fee to the lands to the centre of the street and county road adjacent thereto is in such owner or not, without establishing, by allegations and proofs, that the construction and use of the railway will specially interfere with the owner's ingress and egress to and from his premises.

LORD, J., dissenting.

APPEAL from Circuit Court, Multnomah County.

C. H. Carey, F. D. Chamberlin and P. L. Willis for appellant.
C. B. Bellinger for respondent.

THAYER, C. J.—In this case the appellant sought to enjoin the respondent, a railway corporation, organized under the laws of the state, from building and maintaining a motor line of railway upon a certain street in the city of East Portland, and also upon a certain county road, in the county of Multnomah, which was a continuation of the said street beyond the limits of said city. The appellant alleged in his complaint that he was the owner in fee of block 100, in Stephens' addition to said city, and within the corporate limits thereof, which block abuts upon, and the fee of the land connected therewith extends to, the central line of the street along the north side thereof, which street is 60 feet wide and is known as "Hawthorn Avenue." That said street at the eastern bounds of the city connects with a county road 40 feet in width, which extends east into the county several miles, and is also called "Hawthorn Avenue." And he alleged that, abutting upon the north side of said

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county road, and extending south to the centre thereof, he also owned a tract of land or country property lying about 80 rods east of said city boundary; all being in the county of Multnomah. And appellant further alleged, in substance, that the respondent, without his consent, and without payment or tender of any compensation for the use of said land, or of said street for railroad purposes, or any proceedings had to condemn or appropriate the street or road, or any part thereof, for such purposes, began the construction of a standard gauge railroad, to be operated by steam along said street and road, and over appellant's said property lying within the limits thereof. The respondent justified its acts by building and operating its road upon said street, under authority granted by the common council of the city pursuant to its charter; and of locating, constructing, and operating it upon said county road, under an agreement with the county court for Multnomah county, in accordance with § 3242, Ann. Laws Or. The circuit court, after hearing the case, entered the decree appealed from.

The appellant's counsel have cited a long list of authorities to prove that the fee to the land embraced in the street and road to the centre thereof, upon which the appellant's said pieces of ground abutted, was in appellant; but it was not alleged in the complaint, or claimed, as I understand, that the location, construction and operation of the railroad upon the street and county road effected his said premises in any particular further than the usual annoyances and inconveniences attendant upon the use of that character of appliances. His claim to the injunction seems to have been based upon the grounds that the use of a public highway for such purpose is a new use or additional servitude upon the land occupied by the highway. We have considered that question in connection with the case of *McQuaid v. Portland & V. R. Co.*, *ante*, p. 308, (submitted at this term,) and reached the conclusion that such a use of a highway corporation does not necessarily violate the rights of an owner of the fee to the land included in the highway, or put the land to a use foreign to the one contemplated in the establishment of the highway; nor is it so inconsistent with the principal use as to constitute a "taking" of the land, within the meaning of the constitutional provisions upon that subject, unless it cut off rights belonging to parties by virtue of their relations to the land as a public highway. The establishment of a public highway practically divests the owner of the fee to the land upon which it is laid out of the entire present beneficial interest, of a private nature, which he had therein. It leaves him nothing but the possi-

Right of abutting lot-owner to injunction.

bility of a reinvestment of his former interest, in case the highway should be discontinued as such. This view, I am aware, is contrary to the ancient doctrine that the owner of the fee owned the land subject only to such public uses, and that he had a right of action when the use was diverted to a different purpose. Such a doctrine may have been applicable where the ownership was merely subject to a right of way over the land; but where, as in modern cases, it is devoted exclusively to the purposes of a public thoroughfare, and the control thereof is committed to legally constituted authorities, charged with the duty of maintaining it for such purpose, the doctrine becomes but a vague theory, and should be laid away among the antiquities of a past age. The state has power to regulate and control the use of all public highways; and if it deems proper to admit a railway corporation to enjoy such use in common with the public, in subordination to the authorities having the immediate control of them, I cannot perceive that the owner of the fee had any more right to complain than any other member of the community has, or that his rights are effected in any greater degree. As owner of the land abutting upon the highway, he may suffer a particular inconvenience and damage in consequence of the location, construction, and operation of the railway thereon, and be entitled to claim compensation therefor. If the corporation were to build its road so near his premises, or to so change the grade of the highway, as to interrupt his access thereto, he might reasonably claim damages therefor; but that would arise out of the fact that he was thereby deprived of a right which inhered in his ownership of the premises,—the right of ingress and egress to and from the same by means of the highway,—and without the benefit of which they might be comparatively valueless to him. The same right, however, belongs to every owner of land which abuts upon the highway, and may be enforced in the same manner, when so interfered with. But where the track is located in the middle of the highway, and the railway properly built and operated under such authority, as shown in this case, the adjoining land-owner has no legal cause for complaint. The decree appealed from will therefore be affirmed.

SULLIVAN

v.

NORTH HUDSON COUNTY R. CO.

(New Jersey Court of Errors and Appeals, November 19, 1889.)

Eminent Domain—Compensation—Setting-off Benefits.—In assessing the compensation to an abutting lot-owner for the damage caused by the construction of an elevated railroad in a city street, the jury cannot set off against the damages the general and incidental benefits which come to all alike, either on a particular street or outside of it.

Same—Elevated Railroad—Compensation to Abutting Lot-owner.—When a corporation had been authorized to construct and operate an elevated cable railroad through a street on paying to the adjacent land-owners the value of the easement or right of passage and the damages, and the railroad to be built was to be not less than 13 feet above the street, resting on pillars at least 30 feet apart, it was not error to charge the jury impaneled to appraise the value of the easement, and to assess the damages, that the value of the easement was nominal, or nearly so, but that any hindrance caused by the railroad to those uses of the street which the adjacent owner had a right to make over and above the public should be considered in determining the value.

ERROR to Circuit Court, Hudson County ;

Mr. Wills and Mr. Collins for plaintiff in error.

J. B. Vredenburg and Mr. Besson for defendant in error.

DIXON, J.—Under “An act to enable street-car or horse-railroad companies to provide better accommodation to the public by using what is now known as the ‘cable system for motive power on elevated railroads,’ ” approved March 26, 1886, (P. L. 1886, p. 126,) the North Hudson County Railroad Company obtained the appointment of commissioners to examine and appraise the easement and right of passage over Oakland avenue, Jersey City, in front of two city lots, with apartment houses erected thereon, situate on the westerly side of said avenue, and belonging to the plaintiff in error. The railroad to be constructed was to be elevated at least 13 feet in the clear above the street, to be supported by pillars set on each side of the avenue not less than 30 feet apart longitudinally, and to have double tracks, over which passenger cars were to be drawn by a wire cable put and kept in motion by stationary steam-power, located near the intersection of Palisade and Ravine avenues. The commissioners

appraised the value of the easement and right of passage at \$25, and assessed the damages of the plaintiff at \$20. The plaintiff thereupon appealed to the circuit court of Hudson county, where an issue was framed, a jury trial had, a verdict rendered for a somewhat larger aggregate of value and damages, and a judgment entered therefor, with costs, in favor of the plaintiff. To review questions of law decided during that trial the plaintiff has sued out the present writ of error.

The defendant moves to dismiss the writ on the ground that it will not lie in such a case. Our constitution (article 6 § 5, par. 3) declares that "final judgments in any circuit court may be brought by writ of error into the supreme court, or directly into the court of errors and appeals." The statute already mentioned requires the circuit court to enter judgment on the verdict of the jury, and to award execution thereon. The judgment so entered is therefore final. It follows from the very words of the constitution that the writ of error was lawfully issued. The same conclusion must be reached from previous decisions in this court. A writ of error will run from this court to the supreme or circuit court to bring up any decision therein which is final, in the nature of a final judgment, and which has not proceeded from a matter resting in discretion. *Eames v. Stiles*, 31 N. J. Law, 490; *Adams v. Disston*, 44 N. J. Law, 662. We proceed, then, to consider the alleged errors.

When writ of error lies.

The assignments of error mainly relied on by the plaintiff relate to the rulings of the court touching the measure of damages; the plaintiff contending that the jury were required to set off benefits to land not taken against the damages arising from the taking. The benefits which may accrue to a land-owner by reason of the construction and operation of a railroad across his land are usually regarded as consisting of two classes,—general benefits, being those which affect the whole community or neighborhood, by increasing the facility of transportation, attracting population, and the like; and special benefits, being those which directly increase the value of the particular tract crossed, as if a cut required by the railroad should drain a swamp, or a necessary embankment should maintain a mill-pond, or if a bridge, which the railroad company had to build, should afford a better way between portions of the tract. Of special benefits, there are none in the present case. No advantage could possibly inure to the property of the plaintiff from the construction and operation of this railroad which would not, in greater or less degree, be enjoyed by the entire neighborhood. The plaintiff's counsel, in their brief, justly say: "It is perfectly clear that any enhancement of value to property

Instructions as to benefits.

must arise from increased facilities of travel. There is not the slightest suggestion of benefit from any other cause."

The first question for decision, then, is whether it is true that the judge instructed the jury to set off general benefits against the damages. The matter of benefits arose early in the trial, when counsel for the company was cross-examining a witness of the plaintiffs, with a view of showing that the elevated road rendered the street safer for children than an existing surface railroad. On objection, the judge excluded the inquiry, saying: "The rule undoubtedly is that general benefits are not to be considered." "I have no doubt that the general benefit has to be eliminated." Afterwards, the defendant's counsel proposed to ask one of plaintiff's witnesses whether increased facilities of travel would not benefit the plaintiff's property, and on objection the judge said: "It is in the line of the previous objection and ruling of the court. I am quite clear in excluding everything that touches the question of general benefits." On defendant's counsel asking, "Do I understand your honor to mean to the property right on the line of the street where it goes through?" the judge replied: "Yes; anything that rises from the general benefit is not to be counted in this investigation." Subsequently, several questions were put to the defendant's witnesses for the purpose of presenting the character and extent of the general benefits resulting from elevated roads, and they were overruled. Then, at the close of the evidence, the court charged the jury as to the nature of the easement they were to value, and the injuries for which they were to assess damages, without mentioning benefits; but when the plaintiff's counsel requested the judge to charge the jury directly that they could not deduct from the damages what might be considered a general benefit, he replied: "Yes; I do not consider it necessary to remark at length on the subject. I have referred to it so frequently during the trial of the cause that the jury must understand my views on the subject. It is about this: Where a structure of this sort incidentally confers a general benefit on the property in the vicinity, and you are to estimate the damage done to one who is specially affected by it, that consideration of incidental benefit is not to be regarded—these general and incidental benefits that come to all alike, either on the particular street or outside of it, are not to be regarded—in determining the amount of actual injury done." These statements of the law are clear beyond mistake, and accord with the rule for which the plaintiff in error contends.

But he insists that their force was destroyed by other utter-

ances of the judge during the trial. Several of these expressions, used while the testimony was being taken, indicate that the judge had in mind the possibility of there being some advantage resulting to property along the line of Oakland avenue distinct from the general benefit; but the evident purpose of his words was to confine the attention of counsel and witnesses to the inquiry whether such particular benefit could arise, and they could not have led the jury to believe that advantages of that nature were really shown. It also appears upon the record that, in answer to questions as to the effect of the railroad on the value of the plaintiff's property, the defendant's witnesses generally dilated on the growth of population and business which attended such improvements. But, the questions being in themselves legal, it was impracticable to restrain these excursions of the witnesses; and so the understanding was reached, as is made evident by a remark of plaintiff's counsel placed in the bill of exceptions, that in the charge the court would draw the distinction between general and special benefits. That understanding having been carried out, we should assume that the jury disregarded the testimony as to general benefits which had been given in spite of the judge's effort to exclude it.

Lastly, some expressions in the charge are cited as tending to confuse the jury on the subject of general benefits. The jury were told that they should consider the substantial injury to the value of the property, and that a fair measure of the damage was the difference between the value of the property irrespective of the structure, and the proposition to erect it, and its value after the structure was erected and put to legitimate use. Standing alone, this portion of the charge would have required the jury to deduct general benefits; but the whole charge must be looked at, and, so regarded, it was right. With the explicit direction to exclude from view the general benefits, it was not erroneous to instruct the jury that the depreciation in market value to be caused by the construction and operation of the railroad would fairly represent the damages. With the same context must be interpreted the hypothetical questions of the judge: "If a man can sell his property for more after than before, how can he be injured? How can he be damaged, if the alleged source of harm inures directly to his pecuniary advantage?" The sentence immediately following ("But these general and incidental effects that come to all alike, either on the particular street or outside of it, are not to be regarded in determining the amount of actual injury done") makes the meaning plain. From the whole charge, we think the jury must have understood that the general benefits should be kept out of view, and, no special benefits

having been shown, they must have estimated simply the plaintiff's injury. Consequently, we find no error upon this point.

The remaining exceptions discussed are based upon the instructions of the court touching the value of the easement taken by the company. The judge charged as follows: "With respect to lands over which streets

Measure of damages.

have been laid, the ownership, for all substantial purposes, is in the public. Nothing remains in the original proprietor but the naked fee, which, on the assertion of the public right, is divested of all beneficial interest. Now, it would seem, if that be true, that the value of that easement which a road shall take must be nominal, or very nearly so. What you take from him, that you pay him for; that value, and nothing more." Being afterwards asked to charge "that, if the jury believe it is to become a business street, they must consider the uses to which owners have a right to put the street over and above the public," he said: "Any hindrance caused by the railroad, in the uses of the property, that affect its value, will be matter of consideration in determining the damage." The first statement above quoted is an extract from the opinion of this court in *Hoboken L. & Imp. Co. v. Hoboken*, 36 N. J. Law, 540, 551. With the sentences added by the judge below, it is not improperly applied to the present case. Aside from the damage to the adjacent buildings and lots, the value to the land-owner of the right of way taken by the company must be nominal, or nearly so. The height of the railroad was to be 13 feet, at least, in the clear, and the pillars on which it was to rest were to be not less than 30 feet apart; so that there could be but two, there might be but one, on the plaintiff's part of the street. By such a structure, the owner's peculiar use of the land in the street; either for vaults beneath the surface, or for loading and unloading goods, would scarcely be appreciably lessened; but, if any such hindrance could be caused, the final charge of the judge required the jury to estimate it. His language, as we read it, embraced all of the requests made by the plaintiff on this point. We are not satisfied that there is any error in the record, and the judgment should be affirmed. Affirmed unanimously.

Eminent Domain—Compensation—Consideration of Benefits to Residue of Lands.—See *Pacific Coast R. Co. v. Porter*, (Cal.) 33 Am. & Eng. R. Cas. 167, note 169.

Elevated Railways—Compensation to Abutting Lot Owners.—See *Drucker v. Manhattan R. Co.*, (N. Y.) 30 Am. & Eng. R. Cas. 418; *Fifth National Bank v. New York Elevated R. Co.*, (C. C.) 22 *Id.* 146; *Story v. New York Elevated R. Co.*, (N. Y.) 7 *Id.* 596.

CANAL & CLAIBORNE STREET R. CO.

v.

CRESCENT CITY R. CO.

(Louisiana Supreme Court, May, 1889.)

Street Railroad—Power of City to Authorize Use of Track.—The city of New Orleans, by delegated power from the legislature, has the paramount control and regulation of the streets of the city, and can grant the use of a street railway already constructed to another, which she has authorized to be operated.

Same—Grant of Exclusive Use of Street.—The city council cannot grant the exclusive use of the streets to a street railway, and deprive succeeding councils of the power of performing the duty of regulating the use of the streets in such manner as they may deem best for the public interests.

Eminent Domain—Power to Condemn Street Railway Track.—The proprietary right which a street railway has in its track is subject to the right of eminent domain.

APPEAL from Civil District Court, parish of Orleans.

J. R. Beckwith for appellant.

John M. Bonner for appellee.

MCENERY, J.—This is a suit to recover from the defendant company the value of the use of the street-railroad tracks of the plaintiff, on Canal street, from its terminus, on Canal street, near the levee, up the north side of Canal street to Carondelet; and from the intersection of St. Charles street, both the Canal street tracks on the south side of Canal street to the terminus, near the levee; total length of track, 3,900 feet. Compensation is claimed from September 8, 1881, the date the defendant company commenced using plaintiff's track, at the rate of four cents traveled by each car of the defendant company, amounting to \$15,040.50. The plaintiff alleges that no other company has any right to use its track without its consent for any purpose of traffic or carriage of passengers. The defendant company filed an exception, which was referred to the merits, and then answered, denying that plaintiff had a right to demand pay for the use of its road, as demanded, and that, if they had any right to demand compensation for the use of its road, four cents a mile for each car was too much, and claim that

the ordinances of the city of New Orleans point out the manner in which compensation for the use of the road must be estimated and regulated. The defendant took several bills of exception to the introduction of testimony, some seven in number. They all go to the effect of the testimony, and it was properly admitted.

There is but one question to determine in the case: Was the defendant company authorized by legislative provisions to use the track of the plaintiff; and, in granting the permission, was the mode of compensation regulated? Complete authority has been granted by the general assembly to the city of New Orleans over the streets. The city of New Orleans has paramount control and regulation of them. The operation of a street railway is the exercise of the public right of way over the streets. The street belongs to the public. The proprietary right which a street railway has in its track is therefore subject to the right of eminent domain over its streets vested in the city. The city council may, in the exercise of the power delegated to the corporation in the control and regulation of the streets, grant to one company the right of way over them, and afterwards grant the right of way over a part of the same railway to another company. The city council is without power to grant the exclusive use of a street which belongs to the public to a railway company. It cannot thus deprive succeeding councils of the power of performing the duty of regulating the streets as may seem to them to be for the best interest of the public. There can be no doubt but that the Crescent City Railroad Company had the right to construct and operate its railway, and a part of the line covered a part of the plaintiff's track, on Canal street, and the intersection at St. Charles street, as described in the petition. And there can be no doubt but that the defendant company had been granted the use of the plaintiff's railway, and that with the consent of plaintiff it peaceably put its cars on plaintiff's track and has kept them running on a part of it since that time.

Before the operation of defendant's street railway, the city council, in 1868, passed the following ordinance: Should the city of New Orleans, at any time during the existence of the contract of 6th of May, 1867, between it and the Canal & Clairborne Street Railroad Company, enter into any arrangements with other companies whereby said road on Canal street, from Clairborne street to Front Levee street, and from Front Levee street to Clairborne street, or any part thereof, may be granted, the city of New Orleans, or the road or roads to which the privilege

Right of defendant to use plaintiff's track.

City ordinance.

Street Railroad Company a fair and reasonable proportion of the value of the portion or portions of the road to be used; and should said proportion not be agreed upon between said Canal & Claiborne Street Railroad Company and the city of New Orleans, or the said road or roads, two disinterested persons shall be appointed,—one by the city of New Orleans or the road or roads, as the case may be, and the other by the Canal & Claiborne Street Railroad Company; and, in the event of a disagreement, as to the said proportion to be paid, between said persons thus appointed, a third person or umpire shall be appointed by the judge of one of the district courts of the parish of Orleans, and the decision thereby had shall be final and binding." Ordinance No 1204, N. S. p. 427; Jew. Dig. art. 151. In this ordinance the city council has not only granted the privilege to another company, which it may authorize to operate a street railway, to use the track already constructed, but, it has pointed out and regulated the manner in which compensation must be made. The city had the undoubted power to grant the privilege of the right of way and regulate the manner in which one street railway using the track of another should make compensation. *Covington St. R. Co. v. Covington & C. St. R. Co.*, 19 Am. Law Reg. N. S. 765.

The plaintiff company has failed to follow the requirements of the ordinance.

Judgment affirmed.

FT. SCOTT, WICHITA & WESTERN R. Co. v. FOX.

SAME v. MORSE.

SAME v. HAMILL.

(Kansas Supreme Court, November 9, 1889.)

Construction of Railroad in Street—Compensation—Liability of Purchaser under Foreclosure.—In plaintiff's petition it was alleged that a railroad company built its tracks over a street of a city of the second class in such a way as to render the street wholly useless to him as a means of access to and from his lots, which abutted on the street; that shortly afterwards the railroad and franchises of that company were sold, under a decree of foreclosure, to another company, which company has since operated

the road, and has continued the obstruction and nuisance, and thereby permanently deprived him of all access to the street from his property; that he has never received any compensation on account of the injury sustained by reason of the appropriation of the street, and there has been no consent to the appropriation or waiver of the claim of damages. *Held*, that a cause of action was stated in favor of the plaintiff against the purchasing company, and this, although it was conceded that the road was properly and skillfully constructed; and, *further held*, that the plaintiff is entitled to recover his damages for the permanent appropriation of the street in front of his property, although it is accessible from another street.

ERROR from District Court, Harvey County.

On September 1, 1886, Hugh Fox instituted an action in the district court of Harvey county against the St. Louis, Ft. Scott & Wichita Railroad Company, and on September 1, 1887, by permission of the court, Fox filed a supplemental and amended petition, making the Ft. Scott, Wichita & Western Railway Company an additional party defendant, of which the following is a copy: "Supplemental and amended petition. Comes now the plaintiff, and for his amended petition herein says that the defendant, the St. Louis, Ft. Scott & Wichita Railroad Company, is, and at all times herein mentioned was, a railway corporation, duly and regularly incorporated, under and by virtue of the laws of the state of Kansas, for the purpose of operating a locomotive steam railroad within said state; that the defendant, the Ft. Scott, Wichita & Western Railway Company, is, and at all times herein mentioned was, a railway corporation duly and regularly incorporated, under and by virtue of the laws of the state of Kansas, for the purpose of operating a standard guage steam locomotive railway within said state; that the plaintiff is now, and for the past five years has been continuously, the owner of and in possession of the following described real estate property, to wit: lots twelve (12), fourteen (14), sixteen (16), eighteen (18), twenty (20), twenty-two (22), and twenty-four (24), in block one (1), in Blake's addition to the city of Newton, Harvey county, Kansas, as shown by the recorded plat thereof; that immediately to the west of the plaintiff's said property, and along the west end of said property, and adjoining thereto, there was for many years prior to about the 27th day of July, 1886, a street, avenue, and public thoroughfare of the said city of Newton, known and designated as 'Kansas Avenue,' running north and south; that said Kansas avenue had for many years prior to said 27th day of July, 1886, been dedicated and set apart to the use of the public, and to the especial use of the adjoining lot-owners, as a public street and highway, and had been established as a public highway prior to said date, and had been used as a public highway continuously and constantly for more than fifteen years prior

to said 27th day of July, 1886; that the said avenue was the only way by which the said plaintiff could have ingress and egress to and from his said premises from the west end thereof; that on or about the said 27th day of July, 1886, the said defendant, the St. Louis, Ft. Scott & Wichita Railroad Company obstructed the said avenue in front of the plaintiff's said premises by digging ditches and trenches and laying down and building its main line and side-tracks therein, which consist of iron rails and cross-ties, placed and constructed along said avenue, forming what is known as a standard guage locomotive steam railroad track; that said defendant, the St. Louis, Fort Scott & Wichita Railroad Company, at the time of obstructing said street as aforesaid, lowered the established grade of said avenue, by its trenches and ditches, from three to five feet, and on said July 27, 1886, so constructed its tracks in front of the plaintiff's premises on said avenue, and so obstructed said avenue in the manner aforesaid as to wholly impair and destroy said avenue and render it wholly useless as a public highway, and by such obstruction the plaintiff has been deprived of all means of ingress and egress to and from his said premises from the west end thereof; that the obstruction of said street and avenue as aforesaid was necessary for the proper and skillful construction of said railroad, and said railroad was, at the time and in the manner aforesaid, skillfully and properly constructed; that the defendant, the St. Louis, Fort Scott & Wichita Railroad Company, at the time aforesaid, appropriated said street and avenue in front of the plaintiff's premises for the use of its said railroad by virtue of its right of eminent domain, but without any condemnation proceedings therefor; that after appropriating said avenue as aforesaid said defendant, the St. Louis, Fort Scott & Wichita Railroad company, continued to occupy the same with its tracks, and continued to operate its road upon and along said avenue in front of the plaintiff's premises by running its cars, engines, and trains thereon until about the 15th day of November, A. D. 1886; that on or about the 15th day of November, A. D. 1886, a receiver was appointed over the railroad so owned and operated by the said St. Louis, Fort Scott & Wichita Railroad Company by the circuit court of the United States for the district of Kansas, in an action then pending in the said circuit court for the foreclosure of first mortgage bonds of said railroad, wherein the Union Trust Company, of the state of New York, was plaintiff, and the St. Louis, Fort Scott & Wichita Railroad Company was defendant; that under and by virtue of an order of sale of said circuit court in said action, said railroad, with all its property, was sold on the 23d

day of May, A. D. 1887,; that on or about the 1st day of July, 1887, the defendant, the Ft. Scott, Wichita & Western Railway Company purchased and acquired the said railroad formerly known as the St. Louis, Ft. Scott & Wichita Railroad Company, and on or about the 1st day of July, 1887, took possession of said railroad, and of the tracks in the said avenue in front of the plaintiff's premises above described, and has, ever since so taking possession of said railroad, continued to operate, and still continues to operate the same upon and along said Kansas avenue in front of the plaintiff's said premises; that said railroad tracks have, since they were first constructed upon and along said Kansas avenue, remained in the same condition and position in which they were first constructed, and are now in the same condition; that the defendant, the Fort Scott, Wichita & Western Railway Company, has permanently appropriated said Kansas avenue along and in front of plaintiff's said premises to its own use, for the purpose of operating said railroad; that by the permanent appropriation of the said Kansas avenue, as aforesaid, the plaintiff has been permanently deprived of all means of ingress and egress to and from his said premises from the west end thereof, and by said appropriation said Kansas avenue has been entirely destroyed as a public highway; that the defendant, the Ft. Scott, Wichita & Western Railway Company, has never condemned the plaintiff's right in said avenue, nor have any proceedings been had for the condemnation of the same; that on the sale made by order of the United States court, as aforesaid, there was only sufficient proceeds realized for the payment of the first mortgage bonds of the said railroad, leaving numerous other mortgage bondholders, judgment creditors, and claimants wholly unpaid; that the plaintiff has never been paid, or received any compensation whatever, on account of his damages by reason of the appropriation of said avenue, as aforesaid; that the defendant the St. Louis, Fort Scott & Wichita Railroad Company is wholly insolvent, and has ceased to do business; that by reason of the permanent appropriation of the said avenue, as aforesaid, the plaintiff has been damaged in the sum of \$3,000—wherefore, the plaintiff prays judgment against the said defendants, and each of them, for the said sum of \$3,000, with interest thereon at the rate of seven per cent. per annum from the 27th day of July, A. D. 1886, and for the costs of this action, and for such other and further relief as in equity and in justice the plaintiff is entitled to."

The Ft. Scott, Wichita & Western Railway Company demurred to the amended petition because the same did not state a cause of action against that company, and the court,

upon due consideration, overruled the demurrer. This ruling was excepted to, and is assigned as error.

J. H. Richards and Ady & Henry for plaintiffs in error.

Brown & Kline for defendants in error.

JOHNSTON, J.—The only question presented is whether the amended petition states a cause of action against the Ft. Scott, Wichita & Western Railway Company. The defendant in error, whose property abuts on Kansas avenue, a street in the city of Newton, seeks to recover damages for the total obstruction of the street by the railway company, whereby he is deprived of the means of ingress and egress to and from his property. According to the averments of the petition the road was built by the St. Louis, Ft. Scott & Wichita Railroad Company in July, 1886, and in laying down its main and side-tracks on the street deep ditches and trenches were made in front of Fox's property, rendering the street wholly useless to him as a means of access to his lots, or for any purpose except the operation of the railroad. The road was operated and the obstruction continued until May, 1887, when the railroad property was sold under a decree of foreclosure rendered by the United States circuit court. It was purchased by the Ft. Scott, Wichita & Western Railway Company, which took possession of the property in July, 1887, and has continued to own and operate the road since that time. Whether either of the railroad companies obtained the consent of the city to appropriate the street for railroad purposes is not stated in the petition, but we understood counsel in the argument to concede that such consent was given; but whether the consent was given or withheld, the decision of the case under the allegations of the petition must be the same. In either event Fox was entitled to damages. It is alleged that the entire street opposite this property is obstructed and rendered wholly useless as a highway, or as a means of access to and from the lots. Under the doctrine repeatedly stated by this court, the abutting lot owner is entitled to damages irrespective of any municipal authority or consent, and his right, and the liability of the railroad company, where there has been a complete obstruction of the street, have been so well defined in this state that we need only to refer to the decided cases. *Atchison & N. R. Co. v. Garside*, 10 Kan. 552; *Central Branch U. P. R. Co. v. Twine*, 23 Kan. 585; *Central Branch U. P. R. Co. v. Andrews*, 26 Kan. 702, 5 Am. & Eng. R. Cas. 370; 30 Kan. 590, 14 Am. & Eng. R. Cas. 248; *Ottawa, O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 36 Am. & Eng. R. Cas. 163; *Kansas, N. & D. R. Co.*

Amended petition.

Right to compensation.

v. Cuykendall, 42 Kan. —, 21 Pac. Rep. 1051: Kansas, N. & D. R. Co. *v. McAfee*, 21 Pac. Rep. 1053.

The plaintiff in error claims that the rule established by these cases does not apply, for the reason that the railroad was skillfully and properly constructed. This fact is conceded in the petition, but it does not relieve the railroad company from liability, or affect the determination of the question involved. If the city had granted permission to lay the railroad in the street, and it had been constructed in a proper manner, so as not to impair the usefulness of the street for public travel, or to prevent access therefrom to the abutting lots, Fox would suffer no injury for which he could recover; but neither the authority nor the manner of construction can make any difference where the entire street is appropriated, and the lot-owner is cut off from all access to the street from his property. He suffers an injury not shared by the public generally when he is denied the use and enjoyment of the adjoining street, and it is immaterial whether the proper and skillful construction of the road required the appropriation of the entire street or not. The right of access from the street to his property is an individual one, as inviolable as the property itself, of which he cannot be deprived in any way without creating a liability against the wrong-doer for the consequential damages occasioned.

The principal contention of the plaintiff in error is that it cannot be held liable in anyway for these damages, for the reason that the road was built, and the nuisance created, by the St. Louis, Ft. Scott & Wichita Railroad Company. It is true that a sale made as alleged would convey a title to the purchasing company free from all claims for the general debts of the old company, but the liability for either the creation or continuance of the nuisance does not fall within that class. The old company was a wrong-doer, and had acquired no right to deprive Fox of the use of the street as a means of access to his lots. The company had made no compensation for this appurtenance to his property, nor had he in any way released or waived his claim for damages. The old company, having no right in this appurtenance, could convey none, nor could the claim for the continuing wrong and injury be divested by a sale under the mortgage foreclosure. If the owner had consented to the appropriation in any way, or had stood silent for a long time, with knowledge of the occupancy, a different question would arise; but in this case he promptly pressed his claim for damages against the old company, and, when the transfer of the property and franchises was made, he has promptly adapted his pleadings to the change of owner-

Liability of
purchaser at
foreclosure
sale.

ship, and proceeded against the new company. There has been neither waiver nor payment of the claim for damages. The obstruction and nuisance has been continued by the purchasing company, and while it cannot be held liable for the wrong-doing of the old company, it cannot escape liability for the injury inflicted after it purchased and took possession of the road. The blocking of the street and continuance of the nuisance by the new company is as great an injury to the lot-owner as though that company had originally built the road and created the nuisance. It might have limited its liability if, after taking possession of the road, it had restored the street to its former condition, or to such a condition as not materially to impair its usefulness as a means of access to and from the property. Assuming the facts to be as stated, the company has chosen to block and appropriate the entire street for its own purpose, and both the company and the owner have treated the appropriation as a permanent one. For this permanent appropriation the plaintiff in error must respond in damages if the proof sustains the averments of the petition.

It is further said that, as Fox's premises extend to another street over which the property may be reached, no action for damages can be maintained; and Kansas, N & D. R. Co. v. Cuykendall, *supra*, is cited as authority. The commissioner, in writing the opinion in the case cited, used language of that import, but the court placed its judgment on the ground that the facts in the case showed the building of the railroad on the street, as authorized by the city council, did not destroy the street in front of the lots, nor prevent its use as a means of ingress and egress to and from the property. The additional reason for the judgment stated by the commissioner is inconsistent with the former rulings of the court, and is not approved. In the Twine Case, 23 Kan. 585, damages were claimed and allowed because of an obstruction of an alley at the south end of the lot, notwithstanding it was accessible from a street at the other end of the lot. In the Andrews Case damages were allowed for the obstruction of an alley at the south end of the property, although there was unobstructed access to the injured property by means of streets on the west side and the north end of the same property. 26 Kan. 702, 5 Am. & Eng. R. Cas. 370; 30 Kan. 590, 14 Am. & Eng. R. Cas. 248; 41 Kan. 370.

Accessibility
of premises
from another
street.

The judgment of the district court will be affirmed. In the cases of the Ft. Scott, Wichita & Western Railway Co. v. Morse, No. 4,983, and Same Plaintiff v. D. Hamill, No. 4,984, the facts are substantially the same as in the Fox Case. They were submitted on the same argument, and, as the same legal questions are involved, it follows that the judgment of the dis-

strict court in each case must be affirmed. All the justices concurring.

COHN

v.

LOUISVILLE, NEW ORLEANS & TEXAS R. CO.

(U. S. Circuit Court, S. D. Mississippi W. D., July 6, 1889.)

Removal of Causes—Local Prejudice—Aliens.—Under the provision of the removal act of 1887 that defendants who are citizens of states other than that in which a suit is brought, may remove the action to the federal courts for local prejudice, a removal is not authorized where the party is an alien.

Same—Citizenship of Consolidated Company.—Where the defendant corporation has been created by the consolidation of different corporations by the acts of the legislatures of different states, and the act of the legislature of the state in which suit is brought which authorizes the consolidation, provides that the consolidated company should be deemed a corporation created by the laws of that state, such corporation is a citizen of the state where the suit is brought and cannot have the cause removed under the local prejudice clause of the act of 1887, although the petition for removal avers that the defendant is a corporation under the laws of another state and has its principal office and place of business there.

AT LAW. On motion to remand to state court.

Phelps & Skinner for motion.

Verger & Percy contra.

HILL, J.—This is an action at law, brought by the plaintiff to recover damages for alleged personal injuries inflicted on him while a passenger on defendant's train, and al-

Facts. leged to have been caused by the negligence and carelessness of defendant's employees. The cause was removed from the circuit court of Washington county into this court, upon the petition of defendant under the fourth clause of the second section of the act of 1887, known as the "Prejudice Clause" of the removal act. The questions now for decision arise upon plaintiff's motion to remand the cause to the circuit court of Washington county, from whence it was removed into this court.

It is agreed on the hearing of this motion that the plaintiff is not a citizen of the United States, but is a subject of the emperor of Austria. It is further agreed that the defendant corporation, as it now exists, and did exist when the injuries complained of occurred, was created by the consolidation of different railroad corporations,

Citizenship of defendant.

created by the acts of the legislatures of Louisiana, Mississippi, and Tennessee, respectively, and that the consolidation was authorized by the respective acts of the legislatures of these several states. It is further admitted that the act of the legislature of this state, authorizing this consolidation, provided that by whatever name the consolidated company should be called in the future, it should be held, deemed, and treated as a corporation created by the laws of this state, and liable to all the responsibilities, and entitled to all the rights of such as though said consolidation had not been made. The petition for removal avers that the defendant is a corporation created by the laws of Tennessee, and has its principal office and place of business in that state. While this is true in the state of Tennessee, it is clear from the admitted facts, as well as the act of consolidation of this state, that it is equally a corporation created under the laws of this state, and must be held and treated as such, so far as it relates to its contracts and liabilities incurred in this state.

The grounds of the motion for remanding the cause to the court in which the suit was brought are,—*first*, that the plaintiff is an alien, and not a citizen of this state or district; and, *secondly*, that the defendant is a citizen of this district and state, and that for the want of necessary citizenship of the parties this court has no jurisdiction of the cause under the clause of the act of 1887, under which the removal of the cause was sought to be made. This clause reads as follows: "And where a suit is now pending, or may hereafter be brought, in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant being such citizen of another state may remove such suit into the circuit court of the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court, to which the said defendant may, under the laws of said state, have the right, on account of such prejudice or local influence, to remove said cause." There is no provision in this clause, nor was there any provision in the act of 1875, of which this act is an amendment, where an alien is a party, for the removal of causes from a state court, whether the alien be a plaintiff or defendant; and if there was no other reason, the motion to remand the cause to the circuit court of Washington county must prevail. But if this were not so, it is clear that the defendant is a citizen of this state, so far as this suit is concerned, and was sued as such, and under the provisions of the fourth

Removal
when alien is
party to
action.

clause of the second section of the act of 1887, is not entitled to a removal of the cause, and for this reason, the motion to remand must prevail, and such will be the order of the court.

Removal of Causes—Citizenship of Corporations Chartered in Different States.—See *Pacific R. Co. v. Missouri Pac. R. Co.* (C. C.), 20 Am. & Eng. R. Cas. 590; *Angier v. East Tennessee, V. & G. R. Co.* (Ga.), 20 *Id.* 618, note, 623; *Quarrier v. Baltimore & O. R. Co.* (W. Va.), 18 *Id.* 535; *Horne v. Boston & M. R. Co.* (C. C.), 12 *Id.* 287, note, 299; *Johnson v. Philadelphia W. & B. R. Co.* (C. C.), 6 *Id.* 620; *Missouri, K. & T. R. Co. v. Texas & St. L. R. Co.* (C. C.), 6 *Id.* 596; *Chicago & W. I. R. Co. v. Lake Shore & M. S. R. Co.* (C. C.), 1 *Id.* 627.

GUINAULT

v.

LOUISVILLE & NASHVILLE R. CO.

(*Louisiana Supreme Court, May, 1889.*)

Removal of Causes—Citizenship of Corporation—Affidavit as to Domicile.—Where a suit is brought against a corporation in the courts of Louisiana, and an affidavit for removal alleges that the corporation is a citizen of another state, it is insufficient in not stating that the corporation is not domiciled in the state of Louisiana. A natural person can have but one domicile. A corporation may be created by the laws of several states, and become a distinct corporation in each, domiciled therein, and may be sued in such states as a distinct corporation, in the state courts.

APPEAL from Civil District Court, Parish of Orleans.

W. E. Murphy for appellant.

Bayne, Denegre & Bayne for appellee.

MCENERY, J.—The plaintiff, to abate an alleged nuisance created by the defendant company, brought suit against it in the civil district court for the parish of Orleans.

Case stated. The injunction issued, as prayed for in the petition. The defendant company filed a motion on the plaintiff to show cause why the injunction should not be dissolved after giving bond with security. The application was denied and rejected, and, after the discharge of the rule, the defendant company filed a petition for the removal of the case to the United States circuit court for the eastern district of Louisiana, al-

leging that the defendant corporation is a citizen of Kentucky, and the plaintiff a citizen of Louisiana.

There is no evidence as to citizenship or domicil of defendant, in the record, contradicting the same allegation on the subject in the petition. The affidavit for removal charges that the defendant corporation is a citizen of Kentucky. It is insufficient. It should have alleged and shown that the corporation was not domiciled in the state of Louisiana, as the petition of plaintiff alleges that the defendant company was incorporated under the laws of this state. An affidavit that a natural person is a citizen of one state excludes the idea that he is a citizen of another state. A natural person can have but one domicil. On the other hand, an artificial person or corporation may be created by the laws of several states, and become a distinct corporation in each, and domiciled therein; and may be sued as such distinct corporation in the state in which it has been incorporated, and in which it has a domicil. *Desty, Rem. Causes, 66.*

Citizenship—
Affidavit.

It is therefore ordered that the judgment appealed from be reversed, and the application to remove the cause be denied, reserving to the defendant corporation the right to show that it is not domiciled in the state of Louisiana, and subject to the jurisdiction of the state courts; the defendant to pay costs of appeal.

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J.—While the affidavit in support of the removal states that the defendant company is a citizen of the state of Kentucky, it does not set forth any averment to contradict the allegation in the petition, duly sworn to by the plaintiff, that the company was incorporated by the legislature of this state. The two sworn statements do not conflict, and may well stand together and co-exist, for the corporation may be a citizen of both Kentucky and Louisiana for the purpose of suit. If they be considered contradictory and destructive, there would then remain no evidence of citizenship of the company, as averred in the affidavit for removal.

Rehearing refused.

INHABITANTS OF THE TOWNSHIP OF MONTCLAIR.

v.

NEW YORK & GREENWOOD LAKE R. CO.

(*New Jersey Court of Chancery, August 17, 1889.*)

Charter—Reservation of Power to Alter and Amend.—The provision of the sixth section of the New Jersey act concerning corporations, approved February 14, 1846, (Nixon, Dig. 139,) which was incorporated in the Revision of 1875, (Revision p. 178, § 6,) declaring that the charter of every corporation which should be thereafter granted by the legislature should be subject to alteration, suspension, and repeal, reserves to the legislature the authority, in its discretion, for proper ends, to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant, or any rights vested under it.

Same—Amendment—Supplement to Statute.—Such alteration or amendment may be made by supplement to the act entitled "An act to authorize the formation of railroad corporations, and regulate the same." *Id.* 925.

Same—Obligation to Construct Bridge over Right of Way.—By a charter granted in 1867, the Montclair Railway Company was incorporated and empowered to build a railway, but at the same time was required to construct and maintain bridges where highways should cross its railway. In 1875, upon foreclosure of a mortgage, the property and franchises of that company were sold and transferred to the Montclair & Greenwood Lake Railway Company, then organized in pursuance of Revision, p. 916, § 56; and in 1878, upon another mortgage foreclosure, the same property and franchises were sold and transferred to the New York & Greenwood Lake Railway Company, also organized under Revision, p. 916, § 56. One of these companies graded a right of way across an avenue in Montclair township, Essex county, making a cut 22 feet deep and 69 feet wide through the avenue, but did not lay rails upon it. The last named of these companies now owns and controls that right of way. By a supplement to the act to authorize the formation of railroad corporations and regulate the same, (*Id.* 925,) which was approved in 1887, (P. L. 226,) after the said right of way was graded, and said cut made, it was made the duty of any company that owned or controlled a right of way for a railroad which had been graded in whole or in part, but upon which tracks had not been completely laid, to construct a bridge over such right of way where a public highway should cross it, and provision was made that the duty thus imposed may be specially enforced by bill in the court of chancery, or at the option of the corporation charged with the care of the highway, such latter corporation may build the bridge, and recover the cost thereof from the railroad company by suit. *Held*, that the supplement referred to imposed a duty upon the New York & Greenwood Lake Railway Company which was reasonable, and which did not defeat or impair the object of the grant to the Montclair Railway Company, to which the New York & Greenwood Lake

Railway Company succeeded, or any vested rights under it, and also that the court of chancery, by virtue of the provisions of that supplement, had jurisdiction to compel the specific performance of the duty imposed.

Statutes—Validity of Amending Acts.—It is not necessary in legislation amending statutes to set forth the amended statute and also the statute as it was before the amendment. It is sufficient to set forth the amended act in full.

ON demurrer.

By the complainant's bill it appears that in 1867 the Montclair Railway Company was incorporated by an act of the legislature of this state, (P. L. 301,) which empowered it to construct a railway from the village of Montclair, in the township of Bloomfield, in Essex county, to the Hudson river at or between indicated points, and to construct a branch railroad in Bloomfield township, and extend it into Caldwell and Wayne townships. By the ninth section of its charter the company was required "to construct and keep in repair good and sufficient bridges over or under the said railway where any public or other road shall cross the same, so that the passage of carriages, horses, and cattle across the said railway shall not be impeded thereby." Further authority was given to it to issue bonds, and to secure their payment by mortgage upon its real estate and personal property, its railways and their appurtenances, and its franchises, powers, privileges, and rights under said act. On the 15th of April, 1868, the legislature (P. L. 998) set off from Bloomfield township that part of it which is now known as the township of Montclair, and created the complainant by the corporate name of "The Inhabitants of the Township of Montclair in the County of Essex." On January 1, 1870, the Montclair Railway Company located an extension of its railway into Caldwell township, through a portion of Montclair township, across a public highway called "Mountain Avenue North," and afterwards graded its right of way so located across that avenue by making a cut 22 feet deep and 69 feet wide, and thereby wholly stopped public travel through the avenue. It then constructed a bridge across the cut. In September, 1870, it mortgaged its property and franchises to trustees to secure the payment of its bonds for \$2,000,000. In November, 1873, before the extension of the railway was completed, the trustees under the mortgage commenced proceedings in foreclosure in this court, and on September 27, 1875, by virtue of an execution upon a decree of this court, the property mortgaged was sold. The trustees under the mortgage purchased at the sale, and thereafter, under the authority of the fifty-sixth section of the act respecting railroads and canals, (Revision, 916,) associated with them other persons, to the number required by the stat-

ute, and formed a corporation named "The Montclair & Greenwood Lake Railway Company." The statute just referred to provides that, whenever the railway of any corporation created under any law or laws of this state shall be sold and conveyed under and by virtue of the decree of this court to satisfy incumbrances, such sale "shall vest in the purchaser or purchasers thereof all the right, title, interest, property, possession, claim, and demand, in law and equity, of the parties to the suit * * * of, in, and to the said railroad, * * * with its appurtenances, and also of, in, and to the corporate rights, liberties, privileges, and franchises of the said corporation, but subject to all the conditions, limitations, restrictions, and penalties of the said corporation of and concerning the same," and that the purchasers shall become a new body politic and corporate, "and shall be entitled to all the rights, liberties, privileges, and franchises, and be subject to all conditions, limitations, restrictions, and penalties of and concerning the said railroad * * * so sold and conveyed, which were contained in the act or acts creating, or under which the aforesaid corporation was created, and the supplements thereto, so far as the same was or were in force and unrepealed at the time of such sale and conveyance." In December, 1875, this new corporation mortgaged, as the original corporation had done, and afterwards the mortgage it gave was foreclosed in this court, and in May, 1878, another sale of the property and franchises was had, and the property, etc., was again bought in, and, under the statute last referred to, a new corporation was formed, called "The New York & Greenwood Lake Railway Company." This company is the defendant in this suit.

Since the bridge over the cut across Mountain avenue north was built, it has been suffered to decay and fall down, and has never been rebuilt; and, although the right of way across Mountain avenue north has been graded, the rails have never been laid upon it. By a supplement to the act to authorize the formation of railroad corporations and regulate the same, approved April 28, 1887, (P. L. 226,) the fourteenth section of the act just mentioned was amended so as to provide "that it shall be the duty of any company incorporated under this act *or any company owning, leasing, or controlling any right of way for a railroad within this state, which has been graded in whole or in part, but upon which right of way the track or tracks have not been completely laid*, to construct and keep in repair good and sufficient bridges and passages over, under and across the said railroad *or right of way* where any public or other road, *street, or avenue*, now or hereafter laid shall cross the same, so that public travel on the said road shall

not be impeded thereby;" and also "*that in the event that such company shall not, within a reasonable time after notification from the common council of the city, or committee of the township, in which such bridges and passages are to be so constructed or repaired, proceed to construct or repair the same as required by this act, the said common council or committee may, in the name of such city and township, institute proceedings in the court of chancery against such company to compel the specific performance of the duties imposed upon such company by this section of this act; and in case a decree shall be made against such company in said proceedings, commanding it to specifically perform said duties within a reasonable time to be therein fixed, and such company shall neglect or refuse to specifically perform said duties within said period of time, the chancellor, upon proof of such neglect or refusal, may, in his discretion, issue the state's writ of injunction to restrain said company from the exercise of any franchise, or the transaction of any business, in this state, until said company shall have obeyed the command of said decree, and shall have paid the costs of said proceedings, including a reasonable allowance to the council of such city or township, to be fixed by the chancellor; and further provided that said council or committee, in the event of the failure of such company to construct or repair such bridges or passages within a reasonable time after notification as aforesaid, may, if they shall deem it advisable so to do, proceed themselves to construct or repair such bridges or passages, and, when the cost thereof shall have been ascertained, the same may be collected of and from said company by said common council or township committee by an action at law in any court of competent jurisdiction.*" (All of the quotation from the amended statute which is in italics is new matter incorporated by the amendment referred to.) It further appears by the bill that, after the supplement just referred to went into effect, the complainant notified the defendant to proceed to construct a good and sufficient bridge over its railway at the Mountain avenue north crossing, in pursuance of the terms of the statute last referred to, and that the defendant has refused to do so. The bill prays that the defendant may be decreed to specifically perform the duty of constructing and keeping in repair such bridge. The defendant demurs to the bill, specifying, under the requirement of rule 225, two grounds of demurrer—*First*, that this court has no jurisdiction to decree the building of the bridge; *second*, that, even if the Montclair Railway Company was bound to build and maintain the bridge, the defendant is not.

C. Parker for demurrant.

Wm. S. Gummere for defendant.

MCGILL, Ch. —The supreme court of this state has lately

decided the question raised by the second ground of demurrer, so far as the duty imposed by the charter of the **Case stated.** Montclair Railway Company is concerned, in a case between the state and this defendant, (50 N. J. Law, 303, 32 Am. & Eng. R. Cas. 186,) by holding that the devolution of the property and franchises of the Montclair Railway Company upon the defendant, according to the provisions of the fifty-sixth section of the railroad and canal act, (Revision, 917,) imposes also upon it the duties which, under its charter, that company owed to the public, among which was the obligation to build the bridge in question. I will consider the question whether a like duty is imposed by the supplement to the act to authorize the formation of railroad corporations and regulate the same, above spoken of, and at the same time the question whether, if such a duty was thus imposed, that supplement empowered this court to enforce its performance. It has not been contended that, unaided by the statute, this court has jurisdiction to enforce such a duty, and I will therefore not consider that question. The only insistence is that the bill is sustainable, both as to the duty and as to the court's jurisdiction, under the supplement to the act to authorize the formation of railroad corporations, and regulate the same, (Revision, 925,) which was approved April 28, 1887, (P. L. 226.) The act to which that supplement applies by its fourteenth section imposed the same duty with respect to bridges and highways upon railroad companies formed under it that the Montclair Railway Company's charter required [of that company. The supplement extended the duty to "any company owning, leasing, or controlling any right of way for a railroad within this state, which has been graded in whole or in part, but upon which right of way the track or tracks have not been completely laid," and expressly empowered this court to enforce the performance of the duty imposed by such last mentioned section.

The first question to be considered is whether this supplemental enactment applies to the defendant. By its language it includes any company incorporated under the law to which it is a supplement, "or" (undoubtedly meaning "and") "any company owning," etc., —that is, not only corporations formed under the law mentioned, but other railroad companies that own, lease, or control rights of way that are in a specified condition. The language is broad enough to include the defendant, and the bill's description of the defendant's right of way across Mountain avenue north shows a condition of affairs contemplated by the amendment to the statute. It is suggested that the extension of such a regulation in the act amended to all

Application of
statute to de-
fendant.

railroads has no proper relation to the object of the act as expressed in its title; that the object of the act is to provide for the formation of railroad companies under a general law, and to regulate such companies. That this was not the legislative intent I think is apparent upon bare perusal of the statute. Throughout the act the greatest care is taken, by express language prefacing certain of the sections, to confine the provisions of those sections to corporations formed under the act, but there are other sections which concern proper regulations applicable to any railroad that are not so prefaced, and in terms refer to "any railroad," indicating that the legislative intent was to enact a general law which should regulate all railroad corporations, and at the same time, authorize the formation of new ones. Possibly the most striking indication of this intention is found in the last section of the act, (Revision, p. 935, § 127,) where it is provided that the act may be altered, amended, or repealed, "but such repeal or alteration shall not affect any corporations heretofore organized unless the act making such repeal or alterations shall so expressly declare." It was evidently the legislative intent that the act should extend to all railroad corporations of the state. Its several sections, however, are so drawn as to distinguish, in their application, between corporations organized under that act and all railroad corporations, whether formed under that act or otherwise incorporated. This distinction was evidently the result of an extended consideration of corporate interests, for, in the last section of the act, looking to the maintenance of the distinction, it is provided that when an amendment is intended to extend to corporations organized before the act was passed it shall expressly say so. This act was approved on the 2d of April, 1873, (Revision, 925, P. L. 1873, p. 88,) and the defendant corporation was subsequently, in 1878, organized. Under the language of the act, the amendment may apply to the defendant. The defendant's organization does not relate back to the approval of the charter of the Montclair Railway Company. It is a new company, with powers and duties that that charter gave and requires. *Shields v. Ohio*, 95 U. S. 319.

But it is insisted, as the fifty-sixth section of the railroad and canal act (Revision, 916) virtually extended to the defendant the charter of the Montclair Railway Company, which was a contract with the state defining that which should be required of the company in consideration for that which the statute gave it, and the defendant, by organizing under that section, accepted the contract so tendered, that now the imposition of a new duty, requiring the outlay of money, enacts more than the contract demands the perform-

ance of, and therefore takes the defendant's property without compensation; the argument being that the charter requires the maintenance of bridges over the defendant's railway, while the act now amended extends that duty to the maintenance of bridges over graded or unused rights of way. Without consideration of the question whether an additional duty is imposed, or whether the charter's provisions are susceptible of a construction that will include the duty imposed by the section now considered, I will assume that an additional

**Reservation
of power to
amend and
repeal**

duty was imposed, and proceed to the discussion of the question suggested. Charters of private corporations are regarded as executed contracts between the state and the corporator, and the rule is settled that, if the charter does not contain a reservation of power in the legislature to modify or change the contract, the legislature cannot repeal, impair, or alter such a charter against the consent, or without the default of the corporation. Subsequent legislation modifying such a charter, where there is no such reservation, is unauthorized; but, where such a provision is incorporated in the charter, it is clear that it modifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the constitution. And this power, the charter being silent upon the subject, may be reserved by general law existing at the time the charter is granted, which provides that all charters thereafter granted shall be subject to it. The effect of such a law is the same as if each special charter thereafter contained its provisions, though the charter contains no such reservation of power, nor any allusion to the general law. These principles are well settled. *Miller v. State*, 15 Wall. (U. S.), 478; *Tomlinson v. Jessup*, *Id.* 454; *Shields v. Ohio*, 95 U. S. 319; *Commissioners v. Holyoke Water-Power Co.*, 104 Mass. 446, affirmed 15 Wall. (U. S.), 500; *City of Roxbury v. Boston & P. R. Co.*, 6 Cush. (Mass.), 424; *Massachusetts Gen. Hosp. v. State Mut. L. Assur. Co.*, 4 Gray (Mass.), 227; *White v. Inhabitants of Quincy*, 97 Mass. 430; *Parker v. Metropolitan R. Co.*, 109 Mass. 506; *Story v. Jersey City, etc.*, Plank-Road Co., 16 N. J. Eq. 13, 21; *State v. Commissioners*, 37 N. J. Law, 228; *State v. Person*, 32 N. J. Law, 134; *State v. Douglass*, 34 N. J. Law, 82; *People v. Boston & A. R. Co.*, 70 N. Y. 569; *Albany N. R. Co. v. Brownell*, 24 N. Y. 345.

By the sixth section of an act concerning corporations, approved February 14, 1846, (Nixon, Dig. 139,) it was provided that "the charter of every corporation which shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." This

has continued to be the law of this state hitherto, having, in 1875, been re-enacted as to the sixth section of the revised corporation act. (Revision, 178.) Although the charter of the Montclair Railway Company, which was approved in 1867, does not contain a legislative reservation of power to amend and alter it, it is subject to the general law referred to, and must be regarded as though that law were incorporated in it. There has been some diversity of opinion as to the extent to which this reserved power may be exercised. It is obvious that it would be difficult to fix a limit by precise rule by which all cases might be governed. It will suffice in this case to ascertain the principle which must restrain the exercise of the power upon which the authorities agree, and see whether the legislation considered is within it. Upon this subject, in *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 446, Justice GRAY said: "It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it that will not defeat or substantially impair the object of the grant or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights." In the same case, upon appeal to the United States supreme court, (15 Wall. 500,) Mr. Justice CLIFFORD said: "Vested rights, it is conceded, cannot be destroyed or impaired under such a reserved power; but it is clear that the power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, and to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation. In *Parker v. Metropolitan R. Co.*, 109 Mass. 508, Mr. Justice MORTON said: "The reservation of power is broad and comprehensive. Whatever may be its limitation, it at least reserves to the legislature the right to make any reasonable amendments regulating the mode in which the franchise granted shall be used and enjoyed which do not defeat or essentially impair the object of the grant, or take away any property or rights which have become vested under a legitimate exercise of the powers granted." And in *Shields v. Ohio*, 95 U. S. 319, Mr. Justice SWAYNE said: "The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of

Authorities
examined.

the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions, and are as inviolable as in other cases."

In all these cases the new legislation imposed was sustained as a valid exercise of power. The Holyoke Water-Power Company was required to build a fish-way in its dam across the Connecticut River, at a cost of \$30,000, to preserve the public right of fishing, upon the reasoning that the grant of a right to build the dam did not imply a grant of power to destroy the public right of fishing, but, on the contrary, should be taken to have been made upon the presumption that the public right would be preserved. In *Parker v. Railroad Company* the tolls of a ferry company were reduced. In *Shields v. Ohio*, railroad passenger rates were cut down. In *People v. Boston & A. R. Co.*, a railroad was required to build over a turnpike within a year, the charter having been taken under provisions of the constitution and a general law which permitted the imposition of additional restrictions and burdens. Before the act of 1847, by the charter of the Montclair Railway, substantially the duty now resisted was imposed upon the defendant. The supreme court considers it to be identical. When the charter was enacted and accepted by the defendant's predecessor, it was agreed that the company was to erect and maintain bridges over highways. When Mountain avenue north was cut into, this duty was so recognized that a bridge was actually built. That cut was intended for a railroad, and is yet held by the defendants for that purpose, and I apprehend they will not deny their duty to again erect the bridge which they have neglected to maintain, and have suffered to fall, when they determine to lay rails upon that right of way across the avenue. They justify their denial of present duty under the provision of their charter merely by a literal construction of the charter's language. The bare statement of the facts in this case is convincing that the effect of the act of 1887 is most reasonable.

The case of *City of Roxbury v. Boson & P. R. Corp.*, 6 Cush. 424, is very much in point with the case in hand. There it appears that the Boston & Providence Railroad Company was incorporated in 1831, and required by its charter to raise or lower highways, so that its railroad should pass over or under them. If such construction should not be satisfactory to the selectmen of the locality, the selectmen could call upon the county commissioners to direct what alterations should be made; and, if such alterations were not made by the company, the selectmen might take them, and recover for them from the railroad company. This charter was granted after the passage of the statute of 1830, by which the legislature

reserved power to amend, alter, or repeal acts of incorporation. Chief Justice SHAW, who read the opinion of the court, said: "The defendants, then, having accepted their charter after the above act, and whilst it was in force, took the charter subject to those provisions, and must be bound by any reasonable amendment and alteration which the legislature might thereafter make." In 1842 an act was passed which provided a method by which the mayor and aldermen of cities, when a railroad had been laid over a highway at grade, and it appeared necessary for the public security that the highway should be raised or lowered, could require the railroad company to change the highway. In 1849 another law was enacted, which made provision somewhat similar to that contained in the act of 1842, and gave the supreme judicial court jurisdiction in equity to compel railroad corporations to raise or lower highways where county commissioners duly decided that it shall be done. The county commissioners duly decided that Washington street, in Roxbury, should be elevated over the tracks of the Boston & Providence Railroad Corporation, and that a bridge should be built over the railroad. The company did not carry out the work, and the city of Roxbury filed its bill in equity in the supreme court to compel the building of the bridge. To that bill the railroad corporation demurred, on the ground that the court had no jurisdiction, and that the bill did not state a case which entitled the plaintiffs to the relief prayed for. The demurrer was overruled. To the objection that the acts referred to gave the city a plain and adequate remedy at law by doing the work, and suing the railroad corporation to recover its cost, the court replied that, if the city "must do this work at their own expense, with no other indemnity than that to be obtained by a contested suit with the defendant, this, of itself, would render that remedy anything but plain, adequate, and complete."

Our act of 1887 gives to the township committee the option either of building the bridge and suing the railroad company for the cost, or of filing a bill in this court to compel specific performance of the duty which the law requires. Nothing in the act indicates that resort to the remedy by bill in this court is to depend upon the adequacy or inadequacy of the remedy by construction of the bridge and suit for the cost thereof. That remedy is to be pursued only if the committee think it "advisable" to pursue it; and, if the two remedies were not thus expressly made optional by the legislature, the reasoning of the court in the City of Roxbury Case shows that the remedy by taxation to raise money to build the bridge, the erection of the bridge, and suit to recover its cost,

is not a plain, adequate remedy, but most cumbersome, and illy adapted to secure the performance of the corporate duty considered.

It remains only to consider the insistent at the argument that the act of 1887 is unconstitutional, because it is not with-
 Amendment in that part of article 4, § 7, par. 4, of the constitution, which provides that "no law shall be revived or amended by reference to its title, only, but the act revived, or the section or sections amended, shall be inserted at length." The act of 1887 does not recite the un-amended section of the original act, but it contains the entire section as amended. This form of amendment has several times been held to be constitutional by the supreme court of this state. *Van Riper v. Parsons*, 40 N. J. Law, 123, 127; *Colwell v. Chamberlin*, 43 N. J. Law, 387, 388; *State v. American Forcite Powder Manufacturing Co.*, 50 N. J. Law, 75, 81. I will overrule the demurrer.

Impairing Obligation of Contracts—Effect of Reservation in Charter of Power to Alter and Amend.—See *Sioux City R. Co. v. Sioux City (Iowa)*, 36 Am. & Eng. R. Cas. 143, *ante*, p. 275; *Henderson v. Central Passenger R. Co. (C. C.)*, 20 Am. & Eng. R. Cas. 542; note 14 *ib.* 33; *Santa Clara Co. v. Southern Pac. R. Co. (C. C.)*, 13 *ib.* 182; *Greenwood v. Union Freight R. Co. (U. S.)*, 9 *ib.* 526.

PEOPLE *ex rel.* HUNT, Attorney General.

v.

CHICAGO & ALTON R. CO.

(*Illinois Supreme Court, June 16, 1888, and October 31, 1889.*)

Stations—Obligation of Company to Maintain—Illinois Statute.—Under the provision of the Illinois Act of 1887, that all railroad companies shall build and maintain depots for the comfort of passengers and for the protection of shippers of freight, "where such railroad companies are in the practice of receiving and delivering passengers and freight at all towns, and villages on the line of their roads, having a population of 500," *mandamus* will not lie to compel the construction of a depot at a town having a population of more than 500, when it affirmatively appears that the railroad company has not been in the practice of receiving and delivering passengers and freight at that place.

Same—Obligation of Company at Common Law—Mandamus.—Where it appears that a town has a population of 1800; that it is situated on the line of the defendant's railroad about midway between two stations seven miles

apart, and that various manufacturing and other business enterprises are carried on within its limits for which transportation facilities are necessary, the right of the public at common law to the establishment and maintenance of a freight and passenger station on defendant's line at that place is established, and *mandamus* will lie to compel it to establish a station and stop its trains. Reversing 35 Am. & Eng. R. Cas. 462.

APPEAL from Circuit Court, Madison County.

On rehearing. The opinion of the court on the original hearing, which is now reversed, was rendered on June 16, 1888, and is reported in 35 Am. & Eng. R. Cas. 462.

Geo. Hunt, Atty. Gen., for appellant.

Wise & Davis for appellee.

ON PETITION FOR REHEARING.

BAILEY, J.—This was a petition for a *mandamus*, brought by the people of the state of Illinois, on the relation of the attorney general, against the Chicago & Alton Railroad Company, to compel said company to establish and maintain a station for the receipt and discharge of passengers and freight at Upper Alton, in Madison county.

The petition alleges that said company is a railroad corporation, organized under the laws of this state, and owning, operating, and controlling a line of railway in said county, known as the "St. Louis, Jacksonville & Chicago Railroad," and extending from Godfrey, a station in said county, to Wann, also a station in said county, said stations being seven miles apart; that said company is a common carrier, and operates and runs upon and over said railway two passenger trains daily from south to north, and one passenger train daily from north to south, and two or more freight trains daily in each direction; that about midway between said station there is located upon the line of said railway the town of Upper Alton, the same being an incorporated town or village containing over 1,800 inhabitants; that many persons require the use of said railway in order to be transported thereon as passengers to and from said town of Upper Alton, and that in said town are many merchants, manufacturers, dealers, and business men, who require the transportation of freight, produce, and manufactures over said line of railway to and from said town of Upper Alton; "that the accommodation of the public living in and near to said town of Upper Alton, in the transportation of freight and passengers to and from said town, require, and long have required, that said Chicago & Alton Railroad Company establish a depot and freight house at said town of Upper Alton, and stop its trains, both freight and passenger thereat for receiving and

discharging freight and passenger;" that said company has acquired, and for many years has owned, suitable and convenient grounds for the establishment of a depot and freight house in the town of Upper Alton upon its line of railway, which said grounds were acquired by condemnation proceedings, for use for side tracks, freight and passenger depots, and depot grounds, and that property in said town has been bought and sold upon the belief and representation that a depot would be maintained at that place; that the town council of said town, and many of the citizens of the town and vicinity requiring the use of said railway, and the railway and warehouse commission of the state of Illinois, have requested and demanded of said company that it establish and maintain upon its said grounds in said town a suitable depot and freight-house, and that it stop its trains, or a sufficient number thereof to accommodate the public, at said station, and that it receive and discharge freight and passengers thereat when requested,—yet said company has wholly refused, and still does refuse, to maintain either a passenger or freight depot in said town, or to receive or discharge freight or passengers thereat.

The petition further alleges that said line of railway extends in a westerly direction from the town of Godfrey, and that there are many persons desiring to travel on said railway from said town of Upper Alton to towns on the line of said railway west of said town of Godfrey, and that persons going west are now compelled to go to Godfrey to take the same train which passes through the corporate limits of the town of Upper Alton; and the most convenient route for passengers to reach Godfrey now is to go a distance of two and one-half or three miles to the station of Alton, and go by the way of the Chicago & Alton Railroad a distance of four or five miles to Godfrey, and there they are compelled to wait one hour for the train which such passengers might, if the prayer of the petition were granted, take in the town of Upper Alton.

The petition prays for a writ of *mandamus* commanding said company to establish a passenger and freight depot upon its said line of railway in said town of Upper Alton, at a suitable and convenient point to accommodate the public and all persons desiring transportation for freight or passengers to and from said town, and to stop its trains, both freight and passenger, or a sufficient number thereof to accommodate the public, and discharge passengers and freight thereat when requested, and that, upon the final hearing, such further order might be made in the premises as to the court should seem meet and proper.

To the foregoing petition the defendant interposed a gen-

eral demurrer, which was sustained by the court, and the attorney general electing to abide by his petition, final judgment was entered in favor of the defendant. From that judgment the petitioners have appealed to this court.

There is, so far as we have been able to discover, no provision of any statute which can be appealed to in support of the prayer of the petition. Neither in the defendant's charter nor in any other act of the general assembly does there seem to be any attempt to prescribe the rules by which the defendant is to be governed in the location of its freight and passenger stations, or to confer upon the circuit court the power to interpose and direct as to their location. It is plain that the act of 1877, the only one to which we are referred in this connection, can have no application. That act provides "that all railroad companies in this state, carrying passengers or freight, shall, and they are hereby required to, build and maintain depots for the comfort of passengers, and for the protection of shippers of freight, where such railroad companies are in the practice of receiving and delivering passengers and freight, at all towns and villages on the line of their roads having a population of five hundred or more." 2 Starr & C. St. 1924. While it is true that Upper Alton is a town having a population of more than 500, it affirmatively appears that it is not a place where the defendant has been in the practice of receiving and delivering passengers and freight, and so is not within the provisions of said act. The petition seeks to have the defendant compelled to establish a station where none has heretofore existed, while the statute merely requires the erection of suitable depot buildings at places where the railway company has already located its stations, and is in the practice of receiving and discharging passengers and freight. In point of fact, the attorney general, in his argument upon the rehearing, admits that there is no statute upon which his prayer for a *mandamus* can be based; the position now taken by him being that, upon the facts alleged in the petition and admitted by the demurrer, the legal duty on the part of the defendant to establish a freight and passenger station on its line of railway in the town of Upper Alton arises by virtue of the principles of the common law.

Statutory obligation to build depot.

It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however is not absolute, but is subject to the

Discretion of company in locating station.

condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public. Railway companies, though private corporations, are engaged in a business in which the public have an interest, and in which such companies are public servants, and amenable as such.

This doctrine has been repeatedly announced by this and other courts. Thus, in *Marsh v. Fairbury, P. & N. W. R. Co.*, 64 Ill. 414, which was a bill for the specific performance of a contract by which the railway company agreed to locate its passenger and freight depots at a particular point in a certain town, and at no other point in said town, we said: "This is not a case which concerns merely the private interests of two suitors. It is a matter where the public interest is involved. Railroad companies are incorporated by authority of law, not for the promotion of mere private ends, but in view of the public good they subserve. It is the circumstance of public use which justifies the exercise on their behalf of the right of eminent domain in the taking of private property for the purpose of their construction. They have come to be almost a public necessity; the general welfare being largely dependent upon these modes of intercommunication, and the manner of carrying on their operations." In the same case, in holding that the contract there in question ought not to be specifically enforced, we further said: "Railroad companies, in order to fulfill one of the ends of their creation,—the promotion of the public welfare,—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require."

In *Ohio & M. R. Co. v. People*, 120 Ill. 200, 30 Am. & Eng. R. Cas 509, which was a petition for a *mandamus* to compel the railway company to repair, generally, a certain portion of its road, and to increase its passenger trains thereon, we said: "There can be no doubt of the duty of a railway company to keep its road in a reasonable state of repair, and in a safe condition. Nor is there any doubt of its duty to so operate it as to afford adequate facilities for the transaction of such business as may be offered it, or at least reasonably be expected. * * * The company, however, is given, as it should be, a very large discretion in determining all questions relating to the equipment and operation of its road; hence courts, as a general rule, will not interfere with the management of railways in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted."

It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points,

and in such manner, as to subserve the public necessities and convenience that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void. *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592; *St. Louis, J. & C. R. Co. v. Mathers*; 104 Ill. 257, 9 Am. & Eng. R. Cas. 200; *Bestor v. Wathen*, 60 Ill. 138; *Linder v. Carpenter*, 62 Ill. 309; *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602; *Railroad Co. v. Seely*, 45 Mo. 212; *Holladay v. Patterson*, 5 Or. 177; *Tayl. Corp.* § 162, and authorities cited.

We have now to consider whether, in the light of the principles above laid down, a right to the relief prayed for is sufficiently shown by the petition. There can be no doubt that the act sought to be enforced (the establishment and maintenance of a freight and passenger station on the defendant's line of railway at a convenient point within the town of Upper Alton) is sufficiently specific to be enforced by *mandamus*; and it only remains to be seen whether the right to have its performance enforced is shown to be clear and undoubted. It should be observed that there is no controversy as to the facts; the allegations of the petition being, for all the purposes of this appeal, conclusively admitted by the demurrer.

Common law
obligation to
establish sta-
tion.

The petition undertakes to show the public importance and necessity of the station asked for in two ways—*First*, by alleging the facts and circumstances which tend to prove it, and, *secondly*, by directly averring it. It cannot be doubted, we think, that the facts alleged make out a clear and strong case of public necessity. They show that Upper Alton is a town of over 1,800 inhabitants, situated on the line of the defendant's railway about midway between two other stations seven miles apart. The residents of the town and vicinity are shown to be possessed of at least the ordinary inclination to travel by railway, and it is averred that many of them have occasion and desire to travel by the defendant's railway between Upper Alton and other points on the line of said railway. Various manufacturing and other business enterprises are shown to be carried on within the town, creating a necessity for the use of said railway for the transportation of manufactured articles, merchandise, and other freights. To avail themselves of transportation upon trains which pass by their doors, the inhabitants of Upper Alton are compelled to go and transport their freights by other conveyances to a neighboring town about three and one-half miles away. Then, as we have already said, the petition directly avers, and the demurrer admits, that the accommodation of the public living

in and near said town requires, and long has required, the establishment of a passenger and freight depot on the line of its road within said town. Unless, then, there is some explanation for the course pursued by the defendant which the record does not give, we cannot escape the conviction that its conduct in the premises exhibits an entire want of good faith in its efforts to perform its public functions as a common carrier, and an unwarrantable disregard of the public interests and necessities. It cannot be admitted that the discretion vested in the defendant in the matter of establishing and maintaining its freight and passenger stations extends so far as to justify such manifest and admitted disregard of its duties to the public.

We are of the opinion that the petition shows a clear and undoubted right on the part of the public to the establishment and maintenance of a freight and passenger station on the line of the defendant's railway in the town of Upper Alton, and it therefore follows that the demurrer to the petition should have been overruled. For the error in sustaining the demurrer, the judgment will be reversed, and the cause remanded for further proceedings. Judgment reversed.

Obligation of Railroad Companies to Establish and Maintain Stations.—See *People v. Chicago & A. R. Co.* (Ill.), 35 Am. & Eng. R. Cas. 462, note 466.

FRAZIER

v.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO. *et al.*

(*Tennessee Supreme Court, October 28, 1889.*)

Mortgage—Judgment for Personal Injuries—Priority of Lien.—Where a railroad company, in settlement of a claim for damages by an employe, agrees to pay to him a specified sum monthly, and the employe undertakes to do such work about the company's shops as he may be physically capable of performing, the sum agreed to be paid to the employe is not a contractual obligation, but is in liquidation of his claim and right of action for personal injuries, and confers upon him a priority over the lien of mortgages under a statute which prohibits railroad companies from creating mortgage liens, which shall be superior to judgments for injury to persons or property.

Master and Servant—Contract to Employ Injured Servant.—Where an injured employe contracts to perform such service in the company's shops as he may be physically capable of performing, in consideration of the company paying him a specified sum per month and he is physically incapable of performing any work under the contract, he is not, in an action to enforce the company's liability, bound to deduct from his claim any sums which he may have earned by other labor,—*e. g.*, by keeping a store.

Foreclosure Sale—Bona Fide Purchaser—Liens.—At a foreclosure sale of the railroad, the property was purchased by a committee of the bondholders, who were duly authorized to purchase as trustees for the creditors. The price at which the property was acquired was \$10,000,000, of which \$100,000 was paid in cash, and the remainder was paid in bonds of the company under a scheme agreed upon by the bondholders. The purchasers were afterwards organized as a railroad corporation and the property conveyed to such corporation by the holders of the legal title. *Held*, that the corporation was not an innocent purchaser as against a judgment for personal injuries which was declared by statute to be a preferable lien upon the railroad.

Mortgage—Power to Execute—Completion of Railroad.—A mortgage executed 25 years after the railroad was completed and in full operation, will not be presumed in the absence of proof or allegation to have been executed under a power conferred by the charter to borrow money and execute mortgages for the purpose of completing the road and equipping it with everything necessary for its full operation.

Same—Title of Statute—Consolidated Company.—A provision authorizing consolidated railroad companies to issue bonds and to secure the same by mortgage, and a proviso declaring that no consolidated company shall have power to create any mortgage or other lien which shall be valid against judgments for timber furnished, work or labor done, or for damages to person and property, are germane to the subject of an act entitled "An act to amend the law in relation to the consolidation of railway companies."

Same—Implied Repeal—Statute Conferring Power to Mortgage.—The provision of the Tennessee Act of March 24, 1887, relative to the consolidation of railroad companies, that no company shall have power to create a mortgage or other lien which shall have priority over any claim for timber furnished, for work or labor done, or for injury to person or property, is not impliedly repealed by the provision of the subsequent act of March 15, 1881, which authorizes railroad companies in general terms to mortgage their roads without any such restriction.

Same—Application of Statute.—The provision of the Tennessee Act of 1877, that consolidated railroad companies should not create mortgage liens which should be prior to claims for injuries to person or property, is not applicable only to such consolidations as were thereafter effected.

APPEAL from Chancery Court, Knox County.

Ingersoll & Peyton for complainant.

W. M. Baxter, Henderson & Jouroleman and *Thornburg & Sanford* for defendants.

LURTON, J.—Some time prior to 1860, there existed two separate railroad corporations,—one known as the "East Tennessee & Virginia Railroad Company," and the other as the "East Tennessee & Georgia Railroad Company. Each owned, and was operating, an independent line of railway, under charter granted by this state. Under

Facta.

the internal improvement acts of 1851-52, state bonds to a large amount were loaned to each company, and thus each became largely indebted to the state. By an act passed February 25, 1869, railroad companies so indebted were permitted to consolidate, and adopt the name and charter of either of the consolidating companies. Under this act, these two corporations consolidated, adopting the name and charter of the East Tennessee & Virginia Railroad. Subsequently, by an act passed December 17, 1869, this consolidation was recognized, and the name of the consolidated company changed to "East Tennessee, Virginia & Georgia Railroad Company." On June 15, 1881, this consolidated company executed to the Central Trust Company of New York, a mortgage to secure an issue of \$22,000,000 of its bonds. This mortgage was known and described as its "Consolidated First Mortgage," and all the corporate property and franchises of the consolidated company, including certain other roads, either purchased or built after the consolidation above referred to, were included therein. On the same day another mortgage, known as the "Income Mortgage," was executed to the same trustee, to secure \$16,500,000 of bonds, known as its "Six per cent. Income and Mortgage Bonds." All the corporate property and franchises of the company were conveyed herein, subject, however, to the consolidated first mortgage, and in addition the income of the road was pledged. Default having been made in the payment of interest upon the bonds thus secured, such proceedings were had in the United States circuit court for the eastern division of Tennessee as resulted in the sale of the mortgaged property and franchises. The purchasers at the sale were a committee of the holders of the bonds, duly authorized to purchase as trustees for the creditors. This committee bid in the entire corporate property for the sum of \$10,000,000. Of this sum, \$100,000 were paid in cash; the remainder of the bid being paid in bonds of the company, under a scheme agreed upon by the holders of bonds. The title was, by deed and decree, conveyed to the purchasers. Subsequently these purchasers, by virtue of an act passed March 12, 1877, organized as a corporation, and adopted the name of the "East Tennessee, Virginia & Georgia Railway Company." After this reorganization the purchased roads were regularly conveyed to the new organization, by the persons in whom the legal title stood, for the nominal consideration of \$10. This foreclosure sale occurred May 25, 1886, and the other proceedings shortly thereafter and during the same year.

Complainant, claiming to be a creditor of the old and insolvent corporation, files this bill under the provision of §§

1492-1496, 3431, 4294, 4295, Code. The old corporation, as well as the new, are the parties defendant. The bill is filed upon the theory that under the law of this state, at the time the foreclosed mortgages were executed, regulating the execution of mortgages by railroads in this state, that the East Tennessee, Virginia & Georgia Railroad Company had no power to make a mortgage of its property in this state which should be valid as against judgments for timber furnished or work and labor done, or for injury to persons or property, incurred in operation of the road in this state, and that the property of the insolvent and debtor corporation in the hands of the reorganized corporation is subject to the demands of all such creditors; the purchasers thereof having no other or higher title than the mortgagees had. The bill is filed under §§ 4294, 4295, and 3431, as a creditor's bill, to reach and subject assets of an insolvent corporation, and apply them equally to all creditors of the preferred class. A large number of creditors, having judgments unsatisfied for injuries sustained in the operation of the old road, or work and labor or timber furnished, have come in by petition, and been allowed by interlocutory orders to become co-complainants in the original bill. The learned chancellor upon the whole case, decreed as follows: (1) That complainant was a creditor, and as such was entitled to judgment and decree against the East Tennessee, Virginia & Georgia Railroad Company, and that his claim was for injuries sustained in the operation of said railway in this state after the execution of the foreclosed mortgages, and while the road was being operated by the mortgagors. (2) That the East Tennessee, Virginia & Georgia Railroad Company was an insolvent corporation and that since June, 1886, had parted with all its property and franchises, and had ceased to perform its functions as a common carrier; and that complainants have no means at law of obtaining satisfaction of their several demands, unless they may compel satisfaction from the property of said corporation in the hands of the new organization. (3) That the mortgages of June, 1881, under which the new company claims title, were subject to the provisions of the act of March 24, 1877, by which act said company was prohibited from making any mortgages or creating any lien superior to claims of the class to which complainants belong. (4) That the East Tennessee, Virginia & Georgia Railway Company is not an innocent purchaser. (5) That a receiver should be appointed and empowered to take possession and sell a sufficiency of the property of the insolvent debtor corporation, owned by it at the date of the foreclosure sale, and situated in this state, and now in possession of the reorganized company, to satisfy

the several judgments determined in this cause to be entitled to priority over the mortgages of June, 1881. From this decree the East Tennessee, Virginia & Georgia Railway Company have appealed, and assigned errors upon each of the several matters so decreed. The original complainant, Frazier, has likewise appealed from so much of the decree of the chancellor as held that his claim should be abated by the sum of \$1,491.

We will first dispose of the first assignment of error filed by the railway company, which challenges the character of Frazier's claim, and insist that it is neither for damages to his person nor for work and labor, but for a breach of contract, and that, therefore, he is not a creditor

Nature of
complainant's
claim.

of the class entitled to invoke the provisions of the act of 1877. Frazier, in January, 1883, was an engineer in the service of the old corporation, and was badly injured by the overturning of an engine. On the 9th August thereafter he entered into a contract with the company for the settlement of his claim for damages thus sustained. This contract is too lengthy to set out. Its substance and legal effect was that the company, on its part, agreed to pay him the sum of \$90 per month for five years. He, on his part, agreed to do such work in the shops of the company as he should be called upon to do, and which he might be physically able to do. If any question should arise as to his ability to do the work, then it was agreed that Dr. Deadrick should settle such question; and, if he should decide that complainant was able to do the work required, then his payments should be abated for the time so lost. The contract further provides that all his medical bills should be paid by the company, and that the sum of \$1,800 should be paid to him as an advance payment upon the contract. In consideration of the foregoing, Frazier released the company from all liability for any damages he might otherwise recover. For several months he was regularly paid the agreed sum of \$90 per month. But when the road passed into the hands of a receiver he was notified that his name had been dropped from their pay-roll. Thereafter he was paid nothing more. Neither before nor after this action of the receiver was he ever called upon or required to render any service. During the time he was paid, he was utterly unable to render any service, and for the greater part of the remainder of the period covered by the contract he continued to labor under disabilities so severe as to have made it physically impossible that he should render any services in the shops of the company. After his payments were stopped, it is shown that for a part of the time he engaged himself in the management of a small family grocery.

and that the service he was able to render was such as could probably have been procured at \$35 per month. The chancellor was of opinion that his monthly claim should have been abated to the extent that he had been able to make earnings in this avocation, and accordingly he abated the gross sum due by \$1,491. We are of opinion that the sum agreed to be paid complainant under this contract was in liquidation of his claim and right of action for personal injuries. The agreement that he should, if able, render services in their shops, if called upon, was a mere incident of the settlement, and the sums agreed to be paid him are not for work and labor, but are agreed payments in liquidation of damages, to be reduced by the value to them of his services to them in their shops, if he should ever be called upon to so labor, and should be physically able. This demand is therefore one for personal injuries.

We think it was error to abate his claim by the value of his labor in his own store. He was never called upon to perform any labor for defendant, and was unable, if he had been, to have rendered service in their shops for any considerable part of the time. He was under no obligation whatever to remain idle. If there was work of a kind which he could do, he was clearly entitled to its fruits, as it was not earned at the loss of his time to defendant. His time and labor belonged to himself, unless he was able to work in their shops, and wrongfully refused to so work when called. To save himself and family from want, he was compelled, in pain and suffering, to engage in the little business he undertook. If defendant had kept its contract with him, he would not, perhaps, have been driven to the necessity he was. It does not lie in the mouth of the defendant to say, under these circumstances, that it was entitled to his time. The assignment of error as to this matter is sustained, and judgment will go for the full amount of the monthly payments in arrear.

Deduction of complainant's earnings from claim.

We come now to the principal question, which involves the right of complainants as judgment creditors, the judgments being mainly for personal injuries sustained in the operation of the road in this state, to satisfaction out of the property of the old corporation in the possession and ownership of the East Tennessee, Virginia & Georgia Railroad Company. We have already stated the title of this company. It is most manifest that the defense of innocent purchasers without notice cannot be sustained. They must stand or fall upon their title as mortgagees. The proceedings in the foreclosure suit are not pleaded or relied upon in bar of the claim now presented,

Bona fide purchaser of railroad.

though a demurrer, as well as the answer, interposes the defense that the remedy of complainants was against the purchase money. There are two answers to this: *First*, the purchase money was never paid, save in bonds, except a comparatively small sum, necessary to pay costs and counsel fees; *second*, the foreclosure proceedings do not undertake to clear the title of the property sold, and no steps seem to have been taken to bring creditors of the class represented by complainants before the court. If, therefore, the mortgages under which the reorganized company acquired title were involved as to the judgments of complainants, we see no difficulty in a court of equity following the property, and subjecting it, in the hands of any but innocent purchasers, to the satisfaction of these prior liabilities. Any liens placed upon the property by the new company are not affected by any decree in this cause, inasmuch as the holders are not parties, and are therefore not concluded. We only decide that the corporation is not an innocent purchaser, and its assignment of error to this effect is not well taken.

The claim of priority in favor of the judgments of complainants is rested in the bill upon a provision in the act of March 24, 1877, in the following words: "And provided, **Priority.** further, that no railroad company shall have power under this act, or any of the laws of this state, to give or create any mortgage or other kind of lien on its railway property in this state which shall be valid and binding against judgments and decrees and executions therefrom for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of, its railroad in this state." The railway company interpose a number of objections, going both to the applicability and constitutionality of this provision to the mortgages under which they claim title.

The first is that under the charter of the old company it had power to mortgage, and that this general power conferred in their charter is a contractual right, which **Statutory authority to mortgage.** could not be affected by any subsequent legislation limiting the power conferred. The charter has not been made part of the transcript, and it is insisted by complainants that it is not such an enactment, being a special charter, as entitles us to take judicial notice of its terms. This charter is not a mere private act. It was granted in 1847, and is published, as a public act, with the other public acts of that session. Acts 1847-48, p. 195. It has been since more than once referred to in other public acts. Such an act is entitled to judicial notice. *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413; *Hall v. Brown*, 58 N. H. 93;

Whart. Ev. § 294. The fifteenth section of the charter granted to the East Tennessee & Virginia Railroad is the only section relied upon as containing the grant of power to issue bonds and mortgage its property. This section is as follows: "Sec. 15. The said company may at any time increase its capital to a sum sufficient to complete the said road and to stock it with everything necessary to give it a full operation and effect, either by opening books for new stock, or by selling new stock, or by borrowing money on the credit of the company and on the mortgage of its charter and works; and the manner in which the same shall be done, and in either case, shall be prescribed by the stockholders at a general meeting; and any state, or any citizen, corporation, or company of this or any other state or country, may subscribe for and hold stock in said company, with all the rights, and subject to all the liabilities, of any other stockholder." The power here conferred is limited to one purpose,—that of completing its road, and equipping it with everything necessary to give it "full operation." This old road was completed, and in full operation, for perhaps 25 years before the execution of the mortgage in question, and it is nowhere pretended in the pleadings or proof that either of these mortgages were executed for the purpose of completing, or putting into "full operation," the line of road contemplated and authorized by the charter of the old corporation of the East Tennessee & Virginia Railroad.

The power of a railway corporation to execute a mortgage of its franchises, or of corporate property essential to its operations, must, by the great weight of authority, be expressly conferred. Such a power is generally implied when the corporation is one strictly private, as a factory or mill. The reason for the distinction is found in the nature of the obligations and duties imposed upon a corporation in many respects a public corporation. Such a corporation cannot, without express authority, abdicate the functions and duties imposed for public purpose, by either a sale or a lease. For the same reason, it may not make a mortgage, for a foreclosure would bring about a sale and abandonment of its powers and responsibilities. *Jones, Ry. Sec.* §§ 1-10; *Mallory v. Hanour Oil Works*, 2 Pickle, (Tenn.), 603; *Thomas v. West Jersey R. Co.*, 101 U. S. 71. We are of opinion that the limited power conferred in the charter was not sufficient to authorize the issuance of bonds and execution of a mortgage for any other purpose, than that of completing and equipping the original lines contemplated and authorized by the charter; and that mortgage, executed more than 25 years after the completion and equipment of the lines of the road authorized by the orig-

inal charter, and not purporting or shown to be for any such purpose, or to secure renewal of bonds originally for such purpose, will not be presumed, in the absence of proof or allegation, to have been executed for the purpose named in such charter.

The next objection is that the proviso in the act of 1877 is obnoxious to section 17, art. 2, of the state constitution, which

Title of statute.

provides that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title." The title of the act of March 24, 1877, is "An act to amend the law in relation to the consolidation of railways." The first section amends the acts of December 12, 1871, and March 12, 1875, by extending those acts to all railroad corporations "now existing, or hereafter to be created, in this state, whether under a general or special law or laws, or by virtue of statutes of any other state, ratified and confirmed by the authority of the state of Tennessee." The second section authorizes any corporation existing, or hereafter created, under the laws of this state, or any other state, ratified by this, to consolidate itself with any other railroad whose lines shall connect with or intersect the road of such corporation desiring consolidation. The third section defines the rights and powers of the consolidated roads. Among other powers conferred upon the consolidated companies is that of issuing bonds, and to secure same by a mortgage upon its property and franchises. Three provisos are included in this third section. The first declares that "nothing in this act shall be understood or construed to give or to transfer to, or confer upon, any such consolidated company, or person operating such consolidations of railroads, as provided for in this act, or in any other law of this state, any franchise, right, or immunity, or exemptions not now granted by the laws of this state to the railway companies which may form part of such consolidated company." The two following provisos and the concluding section are as follows: "Provided, further, that no exemption from taxation, under the revenue laws of this state, of railroad property and franchises, and capital stock thereon, contained in railway charters or other railway law of this state, shall be by this act, or any other law of this state providing for such consolidation, transferred to or conferred upon such consolidated company, or the property and franchises and capital stock therein, of such consolidation of railroads, or of the property appertaining thereto, and used in the operation thereof; and that the state shall have the power, by appropriate legislation, to prevent unjust discriminations against and extortions for freights and passage over all railroads in this state; and provided, further, that no

railroad company shall have power, under this act or any of the laws of this state, to give or create any mortgage or other kind of lien on its railway property in this state which shall be valid and binding against judgments and decrees, and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of, its railroad in this state. Sec. 4. Be it further enacted that this act take effect from and after its passage; the public welfare requiring it." The act of 1871, amended and extended by the act under consideration, was an act entitled "An act granting certain powers to existing railroad corporations." This act empowered any existing railroad corporation of this state to acquire by purchase or other contract any other railroad. *Second.* The right to hold, use, and operate any road theretofore purchased or acquired. *Third.* The right to consolidate with any other connecting or intersecting road. *Fourth.* It gave power to any existing railroad corporation to issue bonds for any purpose within scope of its powers, or to meet indebtedness already incurred, and power to mortgage its property and franchise to secure such bonds. By a proviso the act was declared not to operate so as to affect any lien in favor of the state, or creditors of such corporation, and that such consolidation shall not be complete until approval of majority of stockholders. By the second section the companies indebted to the state on account of state aid are excluded from the benefits of this act until they should have paid off such indebtedness. The act of March 12, 1875, so amended this act of 1871 as to extend it to all consolidations existing under the joint legislation of this and another state or states, and companies incorporated by another state, where roads connect or intersect in this or another state.

Does this act of 1877 contain more than one subject, within the meaning of the constitutional enactment that no act shall become a law which contains more than one subject? The leading case in this state construing this clause of our constitution is that of *Cannon v. Mathes*, 8 Heisk. 504. The case arose upon the construction of an act entitled "An act to fix the state tax on property," the fourth section of which increased the state tax on privileges 50 per cent. upon the existing basis. Chief Justice NICHOLSON, in delivering the opinion of the court, quoted with approval the view of Judge COOLEY as to the purpose of the clause in question, as follows: "That 'the general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for

Authorities
examined.

by a separate act, relating to that alone, would not only be unreasonable, but would actually render legislation impossible.' He adds: 'The generality of a title is no objection to it, so long as it is not made to cover legislation incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection. The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title defining it.'" The learned chief justice then concludes by saying: "We concur in these general views as sound and practical, and by them the validity of the act in question must be tested." The court held in the case then under consideration that an examination of the different sections of the act indicated that the general subject of the act was state revenue, and that a tax upon privileges was germane to the subject of a tax on property. Concerning the title of the act, the court, after determining that the object of the constitutional provision concerning the title of acts was to prevent surprises or fraud upon the legislature by means of provisions in bills of which the title gave no intimation, and which might therefore be overlooked, and carelessly or unintentionally adapted, laid down the rule for the construction of this claim as to the titles of bills to be that "any provisions of the act directly or indirectly relating to the subject expressed in the bill, and having a natural connection therewith, and not foreign thereto, should be deemed embraced in it."

This liberal rule of construction finds illustration in a number of cases by this court. The case of *Morrell v. Fickle*, 3 Lea (Tenn.), 79, is in point. An act entitled "An act to establish a chancery and law court at Bristol, in the county of Sullivan," was held to embrace the establishment of separate chancery and circuit courts at Bristol, and that the establishment of two separate courts constituted but one subject; that subject being the establishment of such additional courts for Sullivan county as were needed—and this subject was sufficiently indicated by the title. In *State v. McConnell*, 3 Lea, (Tenn.), 333, it was held that an act entitled "An act to create and establish the sixteenth judicial circuit in this state," which detached the county of Trousdale from the seventh circuit, and attached it to the fifth circuit, was valid. This conclusion Judge COOPER put upon the solid ground that "the establishment of a new judicial circuit in a state already divided into circuits must necessarily require some change in the circuits previously existing; and such change may well be considered as germane to the subject, and embraced in a caption embodying the general object." In the case of *Luehrman v.*

Shelby Co. Taxing Dist., 2 Lea (Tenn.), 428, an act entitled "An act to repeal the charter of certain municipal corporations, and to remand the territory and inhabitants thereof to the government of the state," was held to embrace a provision turning the corporate property of such municipalities over to the state, to remain public property for the uses to which it had hitherto been applied. So, in the same case, it was held that an act entitled "An act to establish taxing districts in this state, and to provide the means of local government for the same," was valid, and embraced but one subject, sufficiently indicated by the title, although the act granted municipal franchises to the communities within the limits of the taxing districts, and gave to the corporations thus created all the legislative, judicial, and police powers of an incorporated city, and contained specifications and punishments."

The learned counsel have in argument pressed upon us the case of *Ragio v. State*, 2 Pickle (Tenn.), 272, seeming to find in it some principle of construction hostile to that laid down in *Cannon v. Mathes*. That case does not contain any rule of principle for the construction of the constitutional clause in question in any way antagonistic to the well-settled doctrine heretofore frequently announced by this court. In the ascertainment of the general subject of an act, this court must look to the provisions of the particular act under consideration. If, upon our knowledge of affairs, the act seems to contain matters not germane, but incongruous, we must declare it obnoxious to the provision prohibiting two subjects. In the *Ragio Case* the title was exceedingly restrictive, and implied legislation closing only barber-shops on Sunday. Upon the facts as they appeared in that case, we thought that there was no necessary connection between barbering and keeping bath-rooms. Both might have been prohibited in an act under a title broad enough to comprehend the two things. We therefore held that the subject of the act, as indicated by the title, was the prohibition of barbering on Sunday, and that the closing of bath-rooms was not germane to such a title; the two occupations not being necessarily so connected as to be embraced under the one head of "barbering." The subjects of legislation are infinite. The determination as to whether the several provisions of an act are congruous and germane become largely a question of fact. Particular decisions cannot often be controlling in determinations of subsequent cases arising out of this constitutional provision. Cases will only serve as illustrations of the application of the liberal rule of construction adopted in *Cannon v. Mathes*, and frequently approved in subsequent cases. The *Ragio Case*, upon its facts, was rightly

decided, and no rule of decision is laid down in that case, or is to be drawn from the decision, which in any way conflicts with the earlier cases on the same subject.

Let us test the constitutionality of the act of 1877 by the principles so clearly announced by Chief Justice NICHOLSON: "The object of the act is to regulate and define the terms upon which the state was willing to confer upon railroad corporations the power to consolidate, and to define the powers of such consolidated companies." We have already seen that a railway corporation may not, without express authority, abdicate its functions and duties, either by a sale or lease or mortgage. *A fortiori*, it may not lose its own identity by suffering consolidation with another. It would therefore seem to need no support of argument that when the state, by legislation, undertook to confer upon all railroad corporations the power to absorb another, or to suffer an absorption by consolidation, it might well couple the grant of so extraordinary a power with the condition or proviso that the corporations so empowered to consolidate should not have power, before or after such consolidation, to make any mortgage, or create any lien, which should affect the class of creditors to which claimants belong. This provision seems to be directly connected with the subject, "consolidation," in that it is a condition upon which the power to consolidate, and the unlimited power thereafter to execute mortgages, is granted. The subject of the act is sufficiently indicated by its caption, even under a more rigid construction of the constitutional claim on this matter than the well-settled rule would require. If the title of this act had been "An act defining the terms and conditions upon which the power to consolidate is granted to all railroad corporations, and defining the powers of consolidated companies," it would be hardly more explicit than the title of this act, which purports to be an act amending the whole law on the subject of consolidations. Now, if in the act with the supposed title the first section had provided "that no railroad company shall have power to make any mortgage or create any lien which should be superior to judgments for timbers furnished, or work and labor done, or injuries to persons or property," and the second section, "that all such corporations should have power to consolidate," etc., we would then have an act which by the most rigid construction would contain but one subject, and that subject distinctly indicated by the title; but any fair construction of the act as actually worded, and its title as written, brings us to the same result. The proviso is germane to the subject of "consolidation," and the title sufficiently indicative of this sub-

ject to prevent surprise or fraud, or the unintentional adoption of the act in ignorance of this provision.

It is next insisted that this limitation upon the power to mortgage contained in the act of 1877 is repealed by the act of March 15, 1881. This latter act confers the

power to mortgage in very broad terms, and is extended to all railroad companies existing under the laws of this or another state, and to all companies which might thereafter be created. The act contains no repealing provisions, and in no way refers to any former act upon this subject. It does not, therefore, in terms undertake to repeal any former legislation. Repeals by implication are not favored. An act will never be held to repeal by implication another act, unless it clearly appears that the two acts cannot stand together. The repugnancy between the two acts must be plain and unavoidable. *Hockaday v. Wilson*, 1 Head (Tenn.), 114; *Buchanan v. Robinson*, 3 Baxt. (Tenn.), 152; *Insurance Co. v. Taxing Dist.*, 4 Lea (Tenn.), 644. The act of 1877 contains the proviso in favor of what may fairly be called the claims arising from operation of the railway. The act of 1881 does not contain it. This proviso in favor of operating expense and damage for personal injuries is not an uncommon or unusual one in this state. It first appears in our legislation in the act of February 19, 1873. This was an act entitled "An act to authorize certain railroad companies of this state to issue consolidated or income bonds, and to mortgage their property to secure the same, for the purpose of paying off their indebtedness." By the third section power is given to any railroad company in the state, owing outstanding, floating debts, to issue bonds, to be known as "Income Bonds," for an amount sufficient to pay off such indebtedness, and to secure same by a mortgage of its "rents and profits," and all of its other property. This is perhaps the first general legislation expressly authorizing a mortgage of the income of railroads, and its power is conferred upon the provision that "no such mortgages shall bar any judgment against such roads for work or labor done, or damage to persons or property." Acts 1873, p. 8. Thus we see that it was the clear purpose of the legislature that the power to mortgage income should be coupled with the proviso that claims of the character presented by complainant's should not be affected.

Again, by Act 1877, chap. 12, p. 17, being an act authorizing purchasers at a foreclosure sale of a railroad to organize themselves into a corporation, and settling the power of such reorganized company, the same proviso is repeated, and in such broad terms as to indicate the purpose of the legisla-

Implied repeal of restriction on power to mortgage.

ture that this disability should apply, not only to companies so reorganized thereunder, but that no act authorizing mortgages should be held as authorizing a mortgage or lien which should affect such claims. Claims of the class represented by complainants are for the most part exceedingly meritorious, as against creditors by bond and mortgage, for the reason that such claims arise from the necessary operation of the road while in the hands of the mortgagor by agreement with the mortgagee. Possession, with the right to operate and receive the income, it would seem, should involve the right and duty to apply such income primarily to operating expense. Without this is done, there can be no operation of the road by the debtor corporation, and no payments of interest to the mortgagee. Hence it would seem that a mortgage upon a going railroad to secure a debt to mature at a distant date, whereby the mortgagor is left in possession, would contemplate, even where the income is mortgaged, that the operating expenses, including damages incident to such operation, should be a first charge upon such income, and that only the net income, after payment of all such charges, should pay or be applicable to payment of mortgage debt. In such case, if income was applied to payment of mortgage debt or interest, and operating expenses were left unpaid, it would follow that creditors of the latter class ought to be allowed to marshal the assets, and receive satisfaction out of the *corpus*, to the extent that income had been diverted from payment of operating expenses. *Clay v. East Tenn. R. Co.*, 6 Heisk. (Tenn.), 421; *Fosdick v. Schall*, 99 U. S. 235; *Burnham v. Bowen*, 111 U. S. 776; *Gilman v. Illinois & Miss. Telegraph Co.*, 91 U. S. 603; *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall (U. S.), 459; *Parkhurst v. Northern, etc., R. Co.*, 19 Md. 472; *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1.

It is unnecessary, however, to decide that such claims would be entitled to priority of satisfaction out of income. The state of the pleadings do not perhaps raise this, and it is unnecessary, in the view we have of the statute. We only allude to this equitable principle, in connection with its repeated expression in our legislation prior to the act of 1881, that we may in this light ascertain whether there is such repugnancy between the act of 1881 and that of 1877 as to indicate a legislative intent that the former provisions should by the latter be abrogated. This intent we do not see, and the repugnancy is not obvious. The two acts may stand together, and in such case it is our duty to so declare.

The argument that the proviso in the act of 1877 was intended to apply only to such consolidations as should there-

after occur is practically disposed of by the view we have already announced as to the true construction of that act. If the view we have taken is correct as to the meaning of that act, then it is a proviso affecting all railroad companies alike, whether they shall thereafter consolidate or not.

Application of statute to companies previously incorporated.

It is unnecessary to determine whether the provisions of the act of February 19, 1873, and that of March 16, 1877, limiting the power of railroad corporations with respect to their power of mortgaging property, do not as effectually operate to give superiority to the claims of creditors of the class protected by the subsequent act of March 24, 1877. It is enough to decide, as we do, that the proviso of the act of March 24, 1877, is a valid and constitutional limitation upon the power of the East Tennessee, Virginia & Georgia Railroad Company to mortgage its property in this state; and that complainants are entitled to the relief they seek against the property of that corporation in this state, now in the custody and control and ownership of the reorganized corporation. In view of the well-known fact that railroads are now for the most part built with bonds, and operated largely for the benefit of such creditors, the legislation whereby the debts and liabilities created by the mortgagees in the course of this operation, as operating expenses, are secured as against such bond, is salutary in a high degree, and rests upon principles of unquestioned equity and right. The decree of the chancellor will be affirmed as soon as it is modified as directed herein.

Agreement to Employ Injured Servant—Validity.—See *East Line & Red River R. Co. v. Scott* (Tex.), 38 Am. & Eng. R. Cas. 16.

THOMPSON

v.

WHITE WATER VALLEY R. CO. *et al.*

(*United States Supreme Court, November 4, 1889.*)

Mortgages—Priority—After-Acquired Property.—Where a company has executed a mortgage of its railroad and all the right of way and land occupied

thereby, with the superstructure, and all property, material, rights and privileges then or thereafter appertaining to the road, and afterwards executes a lease of its road to another company which contracts, in consideration of such lease, to construct a section of the road which had not been completed, the mortgage so executed has priority over a mortgage subsequently executed by the lessee of the section constructed by it, although the lessor has joined the lessee in the execution of the latter mortgage.

APPEAL from the Circuit Court of the United States for the District of Indiana.

This suit was brought by holders of obligations of the Indianapolis, Cincinnati & Lafayette Railroad Company, and on behalf of other holders similarly situated, to enforce an alleged lien claimed by them upon earnings of a section of the road of the White Water Valley Railroad Company, against the claim to priority of bondholders secured by an earlier mortgage. The White Water Valley Railroad Company was organized as a corporation in 1865, under the laws of Indiana, with authority to locate, construct, and operate a line of railway from Hagerstown, in Wayne county of that state, to the town of Harrison, Dearborn county, on the boundary line between Indiana and Ohio. To raise the necessary means to construct the railway, the company issued its coupon bonds to the amount of \$1,000,000, in sums of \$1,000 each. They were dated August 1, 1865, and were to mature the 1st of August, 1890, and draw interest at the rate of 8 per cent. per annum, payable semi-annually. To secure the payment of the principal and interest of these bonds, the company executed to trustees, by way of mortgage, a deed, bearing date on that day, of its railroad, and all the right of way and land occupied thereby, with the superstructure, and all property, materials, rights, and privileges then or thereafter appertaining to the road, and the benefit of all contracts with other railroad companies then existing, or thereafter to be made, and all property, rights, and interests under the same. The deed contained the usual covenants to execute suitable conveyances for the further assurance of property subsequently acquired, and intended to be included in the instrument. The company soon afterwards commenced the construction of the road, and by the 4th of November, 1867, completed that part of it which lies between the towns of Harrison and Cambridge City, leaving the distance from the latter place to Hagerstown—between seven and eight miles—unconstructed. It was then without the requisite means to equip the part of the road completed, or to undertake the construction of the remaining portion of the road. In this condition it entered into a contract of perpetual lease with the Indianapolis, Cincinnati & Lafayette Railroad Company, a corporation then in existence, in con-

sideration of which the latter company agreed to furnish all the necessary equipments, material, and laborers to operate the line of the road then completed, and to construct and put in good and safe running order for the accommodation of the public that part of the line then uncompleted, that is, the section between Cambridge City and Hagerstown, and to pay to the lessor annually the sum of \$140,000 in four quarterly payments of \$35,000 each. The contract referred to the mortgage of \$1,000,000 before mentioned, and provided for the payment of the interest thereon out of the rents received, and for the resumption of possession by the lessor if the lessee failed to keep its covenants.

The Cincinnati, Indianapolis & Lafayette Company went into the possession of the property thus leased, and proceeded to have the remaining portion of the line of the road between Cambridge City and Hagerstown constructed. For that purpose, the lessee, on the 7th of December, 1867, entered into a contract with Benjamin E. Smith and Henry C. Lord by which these gentlemen agreed to construct the remaining portion of the line; and the lessee agreed, in consideration of such construction, to issue to them, or to such parties as they might name, obligations of the company to the amount of \$205,000, divided into shares of \$100 each, which obligations were to be transferable on the books of the company like shares of stock, and the principal thereof was to be irredeemable, but bear interest at the rate of 8 per cent. per annum, payable semi-annually. The contract with these parties recited the right of the lessee company to the perpetual use and possession of the railroad from Harrison to Hagerstown, and the right to construct the uncompleted portion of the road, and have the benefit of all donations made for that purpose; and provided that, in payment for the construction of the uncompleted portion, the lessee was to issue its obligations to the amount of \$205,000, as before mentioned. Under this contract the line of railway between Cambridge City and Hagerstown was completed, and the lessee company remained in its possession from July, 1868, to May 1, 1871, receiving the income thereof, and gave its certificates for the obligations mentioned to Lord and Smith to the amount of \$205,000. While the work upon this section of the road was in progress, it was agreed between the contractors and the lessee company that the holders of the certificates for the obligations should have a perpetual lien upon all the earnings of the line constructed by them, to secure the payment of the semi-annual interest, as stipulated; and on the 23d of April, 1868, such lien was given by resolution of the board of directors of the lessee company. On the 10th of July, 1869, the lessor company and

the lessee company united in executing and delivering a mortgage to Smith and Lord upon the section of railroad built by them, in trust to secure the holders of the certificates mentioned. On the 12th of July, 1869, the board of directors of the White Water Valley Railroad Company, by a resolution entered on its records, ratified the contract of lease, and directed its president to execute, or join in the execution of, any writing necessary or proper to give effect to the agreement for the lien on the earnings mentioned. On the 1st of May, 1871, the two corporations, the lessor and the lessee companies, agreed that the original contract of lease should be canceled, and that the road of the White Water Valley Railroad Company should be returned to it. In pursuance of such agreement, the lease was canceled, and thereafter the White Water Valley Railroad Company operated the property, receiving its revenue and earnings, amounting, as charged in the bill, to the sum of \$100,000. It was agreed between these two companies that, in part consideration for the surrender of the road from Hagerstown to Cambridge City, the White Water Valley Railroad Company should recognize the priority of the lien of all the holders of the certificates, and should either pay or discharge the interest thereon continuously thereafter, or make other satisfactory arrangements with such holders; or, failing therein, should surrender to the lessee company the possession of the railroad between those places, and cease to operate the same, or to receive its earnings. The bill charges that the White Water Valley Railroad Company has taken and maintained possession of the section of the railroad mentioned since the 1st day of May, 1871, up to the commencement of the suit, and been in the receipt of all its earnings, and has disregarded its obligations to the holders of the certificates. The bill, therefore, prays that an account be taken of the income and earnings of the said branch, and that out of the same the amount due the complainants on their certificates be directed to be paid, and that in default of payment the lien be foreclosed and the property sold. Answers were filed to this bill, and replications to them, and proofs were taken. Pending the progress of the case, the White Water Railroad Company, a corporation under the laws of Indiana—a different corporation from the White Water Valley Railroad Company—was permitted to intervene in the case. It seems that after the commencement of this suit the trustees in the mortgage of August 1, 1865, brought suit for the foreclosure of the mortgage executed to them, and obtained a decree for the sale of the entire road mortgaged, which included the whole of the road from Harrison, in Dearborn county, to Hagerstown, in the county of Wayne, em-

bracing that portion extending between Cambridge City and the town of Hagerstown; and under such decree said property was sold, and the White Water Railroad Company became its purchaser. In its answer to the bill of complaint, that company set up the proceedings had in the foreclosure suit, the decree for the sale of the property mortgaged, and its purchase of the same. The court below decreed in its favor, holding that the whole of that railroad, including the portion lying and extending between Cambridge City and Hagerstown, was thus acquired and owned by the White Water Railroad Company, and that the only equitable relief to which the complainants were entitled was a possible right to redeem from said mortgage, and gave to the complainants 30 days in which to commence proceedings for such redemption, and ordered that in default of such proceedings the bill should be dismissed. The complainants declined to take any proceedings for that purpose, and the bill was accordingly dismissed; and they have appealed to this court.

C. B. Matthews and D. Thew. Wright for appellants.

W. H. H. Miller for appellees.

FIELD J.—From the above brief statement of the case, it is clear that the decree of the court below must be affirmed. The claims of the complainants, whether validity and force may be given to them as liens upon the earnings of the section of road from Cambridge City to Hagerstown, between the parties agreeing to such liens, are entirely subordinate to the rights of the bondholders under the mortgage of the White Water Valley Railroad Company, executed for their benefit to trustees on the 1st of August, 1865. That mortgage was made before the claims of the complainants had any existence. It covered the entire property of the company then owned by it, including its line of railway from Hagerstown, in Wayne county, to Harrison, in Dearborn county, and all property appertaining to the road which it might afterwards acquire. The validity of mortgages of that character by railroad companies upon property which may be subsequently acquired is not an open question now. It has been affirmed by adjudications of the highest courts of the states, as well as by this court. Indeed, in a majority of cases, mortgages by such companies upon their roads and appurtenances have been executed for the purpose of raising the necessary means to construct the roads; and sometimes, indeed, when the lines of such roads had only been surveyed. In *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 481, there were several deeds of trust which in terms covered after-acquired

Lien upon
after-acquired
property.

property, each of which was similar in its character to the one in this case: and the court held that they estopped the company, and all persons claiming under them, and in privity with them, from asserting that they did not cover all the property and rights which they professed to cover. Said the court: "Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases." See, also, *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 283, and cases there cited.

The decision in the case of *Galveston, H. & H. R. Co. v. Cowdrey* also covers the only plausible position of the complainants, —that they have a lien upon the earnings of the section because with their moneys the road over it was constructed. But the work was not done at the

Lien of complainants upon earnings.

request of the mortgagees, but upon a contract with the lessee of the road, which had stipulated, as one of the considerations of the lease, to construct that part of the line. With those contractors the bondholders, secured by the mortgage of August 1, 1865, had no relations, and incurred no obligation to them. In the case cited, it was contended that priority should be given to the last creditor for aiding to conserve the road. But the court answered that this rule had never been introduced into our laws, except in maritime cases, which stand on a particular reason; that, by the common law, whatever is affixed to the freehold becomes part of the realty, except certain fixtures erected by tenants, which do not affect the question; and that the rails put down upon the company's road become a part of the road. Here the same rule applies; and not only the rails, but those permanent fixtures which are essential to the successful operation of the road, become a part of the property of the company, as much so as if they had existed when the mortgage was executed. The doctrine that a vendor, not taking security for the price of realty sold by him, holds in equity a lien upon the property for such price, is not controverted, but it has no application to the present case. The only right which the complainants possessed was that which was recognized by the decree,—a right to redeem the property from the sale under the mortgage; a right which they were allowed to ex-

ercise within a specific period,—but they declining to do so, the bill was properly dismissed. Decree affirmed.

Mortgages of After-Acquired Property.—See *Texas W. R. Co. v. Gentry*, (Tex.) 33 Am. & Eng. R. Cas. 46, note, 55; *Mase v. Nichols*, (N. Y.) 17 *Ib.* 230; *Boston & N. Y. A. L. R. Co. v. Coffin*, (Conn.) 12 *Ib.* 375, note, 388; *Branch v. Jesup*, (U. S.) 9 *Ib.* 558; *Meyer v. Johnston*, (Ala.) 8 *Ib.* 584; *Little Rock & Ft. S. R. Co. v. Page*, (Ark.) 7 *Ib.* 36; *Hamblin v. European & N. A. R. Co.*, (Me.) 4 *Ib.* 503, note, 511; *Hamblin v. Jerrard*, (Me.) 4 *Ib.* 488; *Mississippi Val. R. Co. v. Chicago, St. L. & N. O. R. Co.*, (Miss.) 2 *Ib.* 414.

HOLLAND.

v.

LEE *et al.*

(*Maryland Court of Appeals, November 15, 1889.*)

Mortgage—Sale under Foreclosure—Bond for Price.—Where the purchaser of a railroad at foreclosure sale executed bonds pursuant to the decree of confirmation, which directed the commissioners to execute a deed to the purchasers who "shall execute to the aforesaid commissioners their individual bonds which shall be secured by a lien reserved in the conveyance," and the commissioners thereupon conveyed the property to the purchasers "under the name of the W. & W. R. Co.," subject to lien for the balance of the purchase money as represented in the bonds, the bonds are the individual obligations of the grantors thereof, and are not the obligations of the railroad company, notwithstanding a statute which declares that upon the conveyance of the property of a company under a mortgage or decree, the purchaser, "shall forthwith be a corporation by any name which may be set forth in the said conveyance, or in any writing signed by him."

Same—Demand of Payment.—By the terms of the deed it was stipulated that the lien might be enforced against the purchaser, "or whoever may be in possession of the property hereby conveyed." *Held*, that the fact that no demand for payment was made upon the obligors when the first bond matured, but was made at the office of the railroad company and notice of foreclosure was served upon it only, is not sufficient to show that the obligors were not regarded as personally liable.

Same—Sufficiency of Consideration.—The bonds, having been given for the payment of the purchase price of the road, were supported by sufficient consideration, and the fact that the property was conveyed to a corporation of which the purchasers were members, did not destroy or defeat that consideration so as to render the bonds invalid.

APPEAL from Superior Court of Baltimore City

Action by Richard Lee and others, special commissioners for the sale of the property and franchises of the Washington and Ohio R. Co., against Jackson Holland and others, the obligors in certain bonds executed to secure the purchase price. Service was only obtained upon Holland, the other defendants being non-residents, and he only appeared and defended. There was a verdict and judgment for the plaintiffs, and cross-appeals were taken.

Bernard Carter and *Samuel Snowden* for Holland.

John T. Mason, R., and *H. O. Claughton* for Lee and others.

McSHERRY, J.—By a decree of the circuit court of the city of Richmond, in the state of Virginia, passed on the 23d of April, 1880, in a foreclosure proceeding wherein Henry Lewis and others were plaintiffs, and the Washington & Ohio Railroad Company and others were defendants, Richard H. Lee, Henry Heaton, Charles E. Stuart, and Robert T. Barton were appointed commissioners to make sale of the property and franchises of the Washington & Ohio Railroad Company, a corporation located in the state of Virginia. The terms of sale prescribed were \$50,000 cash, and the residue in four equal annual payments, to be evidenced by the bonds of the purchaser, secured by a deed of trust upon the property sold. On the 31st of January, 1882, the commissioners sold the property to Cazenove G. Lee for the sum of \$592,000. The purchaser having failed to comply, subsequent proceedings were had, whereby the time for the performance by him of the terms of sale was extended till May 26, 1882. On May 24th, Cazenove G. Lee paid the cash payment, and gave his bonds for the deferred payments. After the sale to Lee he assigned his purchase to William J. Best, and the circuit court on May 25, 1882, confirmed the sale made on January 31st to Lee; but as Lee desired "that the sale should be confirmed to the said Best for himself, and such persons as he might thereafter associate with him," it was, by the said decree confirming said sale, directed that "the aforesaid commissioners shall execute and deliver to William J. Best, and to such persons as may be associated with him, a deed for the property sold, * * * and that said William J. Best, and such persons as may be willing to sign the same, shall execute to the aforesaid commissioners their individual bonds, which shall be secured by a lien reserved in the conveyance. Best delivered to the commissioners four bonds, each for the sum of \$135,500, and each executed by himself and eight other persons, of whom the appellant was one, which bonds the commissioners re-

ceived in exchange for those previously given by Cazenove G. Lee. The bonds are in the form following, to wit: "\$135,500.00. May 15th. 1882. On the 31st day of January, 1883, we promise to pay to R. H. Lee, Henry Heaton, C. E. Stuart, and R. T. Barton, special commissioners in the cause of Henry Lewis *et al. v. The Washington and Ohio Railroad Company*, the sum of one hundred and thirty-five thousand and five hundred dollars, with interest thereon from the 31st day of January, 1882, a lien for which sum is reserved in a deed of conveyance this day executed by said commissioners to the obligors hereto. Witness our signatures and seals, this 25th day of May, 1882." Signed and sealed by William J. Best and eight others, including the appellant. On the day of the date of these bonds the commissioners conveyed the railroad and its franchises to the said Best, "to hold unto the said William J. Best and such associates as he may associate with him under the name of the Washington and Western Railroad Company," subject to a "lien for all of the unpaid purchase money, as represented in the four bonds of the said William J. Best and others, each for the sum of \$135,500, with interest from January 31st, 1882." When the first of these bonds fell due, default was made, and under further proceedings had in the circuit court of the city of Richmond the railroad was resold on May 9, 1883, to Oakman & Bates for \$400,000, and on May 23d was conveyed to them under the name of the Washington, Ohio & Western Railroad Company. The proceeds arising from this resale were applied towards the payment of the four bonds of Best and his associates. When these proceeds were credited on the Best bonds a balance was left due thereon, January 31, 1885, of \$203,180.57. To recover this balance, together with interest thereon, suit was brought in the superior court of Baltimore city against all the makers of the four bonds. The sheriff returned the writ served upon the appellant, and non-suit as to the others, they being non-residents of this state. The appellant appeared and made defense. Judgment was rendered against him, and from that judgment he has taken this appeal.

The grounds upon which he claims a reversal of the judgment are these: *First*, that the bonds sued on, though signed by Best and eight other obligors, including the appellant, are not the obligations of the persons who signed them, but are the debts of the Washington & Western Railroad Company; and, *secondly*, that there is no evidence that any part of the consideration for these obligations was ever received by the parties who signed them, and that, therefore, the appellant is not bound upon them.

At the moment these four bonds were given they were undeniably the individual obligations of the persons who signed them. By the decree of May 25, 1882, confirming the sale of January 31st, Best, "and such persons as may be willing to sign the same," were required to execute "their individual bonds" to the commissioners for the deferred payments, and in the conveyance a lien was reserved "for all of the paid purchase money, as represented in the four bonds of the said William J. Best and others." These parties were the purchasers of the railroad, and the bonds were given by them for the unpaid purchase money in conformity with the requirements of the decree. It is manifest they were not, when given, the bonds of the Washington and Western Railroad Company, because that corporation was not then in existence. If they ceased at any time to be the obligations of the persons who signed them, and became the obligations of the new company, the corporate liability of a company created after that personal liability had been assumed, and assumed, too, under the decree referred to, must have been substituted, by some process, for the personal liability of the individual obligors. Unless such a substitution has taken place, the bonds, of course, continue to be what they were when executed. Let us see, then, whether such a substitution or exchange did in fact occur.

By the statutes of Virginia (Code, chap. 61, § 44,) it is provided, in substance, that where a sale is made of the works and property of a company under a deed of trust or mortgage, or, according to section 47, under a decree, the conveyance to the purchaser shall pass to him all the property of the company, other than debts due to it, and that "upon such conveyance to the purchaser the said company shall, *ipso facto*, be dissolved, and the said purchaser shall forthwith be a corporation by any name which may be set forth in the said conveyance, or in any writing signed by him." Now, the argument is that, under this statute, the instant the deed was made, the purchasers, who up to that time were individuals, became a corporation; that "his personality and individuality is lost and merged in his corporate capacity. Whatever existence he may have as a person or individual for other purposes, in his capacity as purchaser of the property he becomes a corporation, and all the duties he has to discharge as a purchaser he discharges as a corporation." Therefore the credit payments of the purchase money which as purchaser he has agreed to pay, he owes only as a corporation, and not as an individual, "because" his only obligation to pay the purchase money is because "he is a purchaser."

But this does not meet the point. Though the purchasers became a corporation under the statute upon the execution and delivery of the deed to them, that fact could not possibly have changed the character of the debt which they personally incurred before the creation of that corporation. The argument assumes that the creation of the corporation discharged the obligations which the purchasers as purchasers, and therefore as individuals, gave, and made the bonds the debts of the corporation, though the corporation never incurred it. It assumes that the individuals have been released, and that the corporation has been made liable, though the former appear on the face of the bonds as the obligors, and actually contracted the debt, and the latter does not so appear, did not contract the debt, and was not even in existence when the debt was in fact contracted. Upon the creation of the corporation the purchasers of the property ceased to hold that property as individuals, and to that extent their personality was merged in their corporate capacity; but it by no means follows from this that all the duties which the purchasers had to discharge as purchasers could only be discharged by them as a corporation. These obligors were not a body corporate when they executed these bonds. As individuals they could lawfully buy the railroad when they bought it; they gave their individual obligations for the deferred payments. They could not operate the road as individuals, and hence they were formed into a corporation, under the statute, when the deed was executed and delivered. But the debt contracted for the purchase still remained what it originally was,—their individual undertaking; and there is nothing in the statute of Virginia which changed the character of that indebtedness, or fastened it upon an after-created corporation, and discharged the original obligors from the payment of it. It is very evident the circuit court of Richmond did not so understand the transaction when it directed by its decree that these "individual bonds" should "be secured by a lien reserved in the conveyance." Upon the theory advanced by the appellant, the commissioners, after conveying the property, would have had no security whatever for the deferred payments other than the very property which they had just before sold. In other words, they would have accepted the obligations of a new corporation for those due by another corporation, whose existence ceased upon the making of the deed which called its successor into being. The only security for these new obligations would have been the very same property which had been also liable for the old indebtedness. Substantially, this would have been a mere change in the name of the debtor. We cannot gather from

the records in the Virginia case the existence of any such intention on the part of the circuit court, the vendor, or on the part of the obligors, the purchasers, of the Washington & Ohio Railroad.

No demand for payment was made upon the obligors personally when the first bond matured, but demand was made at the office of the Washington and Western Railroad Company in Alexandria. Payment having been refused, the resale proceedings were instituted, and notice was served only on the railroad company. It was urged that the facts indicated that the obligors were not regarded as personally liable. But the deed affords an all-sufficient answer to this suggestion. As already stated a lien was reserved on the property, and in the deed it was "understood and agreed" that the lien "may be enforced, in case of any default on the part of the obligors in the aforesaid bonds in their payment, * * * by a rule," etc., "against the said purchaser, W. J. Best, or whoever may be associated with him, or whoever may be in possession of the property hereby conveyed," etc. The rule was served upon the railroad company, and the company was in possession of the property. This was all that was required under the terms of the deed.

A brief observation is all that is needed to dispose of the second ground of defense. These bonds were given for part of the purchase money of the railroad bought by W. J. Best and the other obligors. These obligors got precisely what they bargained for. There was therefore a consideration for the bonds, and the conveyance of the property to a corporation of which the purchasers were the members did not defeat or destroy that consideration. If the venture subsequently proved disastrous, the purchasers, though they failed to realize their expectations, cannot escape, on that ground, the payment of the purchase money which they bound themselves to pay. Notwithstanding the extremely able and ingenious arguments of the learned counsel for the appellant, we are unable to view the case in any other light. The demurrer to the defendant's pleas and the three prayers presented by the appellant raise the questions we have been considering, and, in our opinion, there was no error committed in sustaining the demurrer or in rejecting the prayers. The judgment must therefore be affirmed.

Demand for
payment.

Considera-
tion.

HASSALL

v.

WILCOX.

(130 U. S. 493.)

Statutory Lien—Notice to Bondholders of Foreclosure Proceedings.—Although the statute of a state giving claims for labor a superior lien to that of mortgages, and providing that such lien might be enforced by the sale of the railroad in a suit to which it should not be necessary to make the bondholders parties, though they might intervene, was passed prior to the making of a mortgage, the trustees under the mortgage or the bondholders are not bound by a judgment rendered in a suit brought under the statute by an alleged lien-holding creditor to which they were not parties, and they may, in a subsequent suit in a federal court for the appointment of a receiver, compel such creditor to prove affirmatively the existence and priority of his lien.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

Silas W. Pettit for appellant.

W. Hallett Phillips for appellee.

BLATCHFORD, J.—On the 18th of February, 1879, an act was passed by the state of Texas, (General Laws of 1879, chap. 12,) entitled "An act to protect mechanics, laborers and operatives on railroads against the failure of owners, contractors and sub-contractors or agents to pay their wages when due, and provide a lien for such wages," which provided as follows:

Texas Act of
1879.

"SECTION 1. Be it enacted by the legislature of the state of Texas, that all mechanics, laborers and operatives who may have performed labor in the construction or repair of any railroad, locomotive, car, or other equipment to a railroad or who may have performed labor in the operating of a railroad, and to whom wages are due or owing, shall hereafter have a lien prior to all others upon such railroad and its equipment for such wages as are unpaid.

"SEC. 2. In all suits for wages due by a railroad company for such labor as heretofore mentioned, upon proof being satisfactorily made that such labor had been performed, either

at the instance of said company, a contractor, or sub-contractor, or agent of said company, and that such wages are due, and the lien given by this act is sought to be enforced, it shall be the duty of the court having jurisdiction to try the same, to render judgment for the amount of wages found to be due, and to adjudge and order said railroad and equipments, or so much thereof as may be necessary, to be sold to satisfy said judgment. In all suits of this kind it shall not be necessary for the plaintiff to make other lienholders defendants thereto, but such lienholders may intervene and become parties thereto and have their respective rights adjusted and determined by the court.

"SEC. 3. Suits by mechanics, laborers, and operatives, for their wages due by railroad companies, may be instituted and prosecuted in any county in this state where such labor was performed, or in which the cause of action or part thereof accrued, or in the county in which the principal office of such railroad company is situated, and in all such suits service of process may be made in the manner now required by law.

"SEC. 4. The lien created by this act shall cease to be operative in twelve months after the creation of the lien, if no step be sooner taken to enforce it."

On the 15th of May, 1882, the Rio Grande and Pecos Railway Company, a Texas corporation, made a mortgage to the Mercantile Trust Company of the state of New York, a New York corporation, covering all the property, real and personal, of the Texas corporation, including its franchises, lands, railways, and other property, to secure \$600,000 of coupon bonds issued by it, dated June 1, 1882, payable in thirty years and bearing semi-annual interest at the rate of 6 per cent. per annum.

On or prior to the 27th of March, 1884, A. W. Wilcox presented a petition to the district court of the county of Webb, in the state of Texas, subscribed and sworn to by him before the clerk of that court, in the words following:

"THE STATE OF TEXAS, COUNTY OF WEBB. •

"To the hon. the district court of Webb county:

"The petition of A. W. Wilcox, who resides in the county of Webb, and state of Texas, complaining of the Rio Grande and Pecos R. R. Co., a corporation duly incorporated under the laws of the state of Texas, and operating its lines through the county of Webb, where it has its principal offices, represents that heretofore, to wit, on the 12th day of January, 1884, the said defendant, in consideration of the payment of claims for labor on said defendant's R. R., executed and delivered to your petitioner a

Petition to
foreclosure
lien.

certain promissory note (see note) for the sum of fifty-five hundred and twenty-six $\frac{78}{100}$ dollars, with interest, 10 per cent. whereby defendant promised and became liable to pay your petitioner the said note, with interest, according to the tenor thereof. Your petitioner represents that he is the owner and holder of said note, and that defendant has failed and refused to pay the said note, though thereto requested, to petitioner's damage. Wherefore he prays for judgment for his debt and interest, and damages, and foreclosure of his lien on defendant's railroad and equipments."

The promissory note referred to in said petition was as follows:

LAREDO, TEXAS, January 12th, 1884.

"The Rio Grande and Pecos Railway Company, for value received, hereby promises to pay A. W. Wilcox, or bearer, on demand, the sum of fifty-five hundred and twenty six $\frac{78}{100}$ dollars for services, and for amounts advanced on claims for labor performed in the construction and maintenance of the Rio Grande and Pecos Railroad, with interest at ten per cent. per annum until paid, and upon default in payment A. S. McLane is hereby authorized in the name of the said Rio Grande and Pecos Railroad Company, to confess judgment in any court of competent jurisdiction, hereby waiving citation and service thereof.

"THE RIO GRANDE AND PECOS
RAILWAY COMPANY,

By A. C. HUNT, The President.

"[Corporate Seal of The Rio Grande
and Pecos Railway Company.]"

On the 27th of March, 1884, the district Court rendered the following judgment:

"A. W. WILCOX

v.

"THE RIO GRANDE & PECOS R'y Co.

} 435.

"This day came plaintiff, and the defendant, by attorney-in-fact, A. S. McLane, comes and says that he cannot deny the action of the said A. W. Wilcox, and that he is justly indebted to plaintiff in the sum of fifty-five hundred and twenty-six and seventy-eight one-hundredths dollars, with ten per cent. interest thereon from the 12th day of January, 1884, and it appearing to the court that a sufficient power of attorney has been filed in this cause authorizing A. S. McLane, in default of payment, to confess judgment before any court of competent jurisdiction, and waiving citation and service, it is therefore ordered, adjudged and decreed, that the plaintiff A. W. Wilcox, have and recover of the de-
Judgment.

pendant, the Rio Grande and Pecos Railroad Company, the sum of fifty-five hundred and twenty-six seventy-eight one-hundredths dollars, with ten per cent. interest thereon from the 12th day of January, 1884, for which execution may issue. It is further ordered by the court that the plaintiff have a lien on the said Rio Grande and Pecos Railroad Company and its equipments to secure the payment of this judgment, and that said railroad and its equipments, or so much thereof as may be necessary, be sold to satisfy this judgment."

On the 14th of April, 1884, C. B. Wright a citizen of Pennsylvania and a holder of \$121,000 of the bonds, the interest

Bill for appointment of receiver.

on which, due December 1, 1883, had not been paid, filed a bill in equity in the circuit court of the United States for the Western District of Texas, against the railway company and the Mercantile Trust Company, setting forth that the railway company was the owner of valuable coal lands in the county of Webb, and had recently constructed a railroad from Santo Tomas to Laredo; that the business of the railway was that of a railway and transportation company and of a miner of coal; that recently there had been expended a large amount of money in opening the coal-beds, and erecting appliances for mining the coal and transporting it to market; that the principal business of the railroad was the transportation of the coal thus mined; that the value of the assets of the company consisted largely in the fact that the coal mines and the railroad were owned by the same corporation; and that any separation of the two properties would be disastrous to the creditors of the company, and would lessen materially the aggregate value of the two properties.

The bill then set forth the making of the bonds and the mortgage, and the interest of the plaintiff in the bonds; that the company had recently incurred a debt of between \$20,000 and \$40,000, in constructing and equipping the railroad; that, under the laws of Texas, such debt was entitled to a first lien on the road and its franchises and property, in preference to the first-mortgage bondholders, for a period of twelve months after its completion; that long before the expiration of twelve months from such completion, suits were brought upon many, if not upon all, "of the labor and material claims above mentioned," and judgment in some instances had been had thereon, on which executions had been issued which were then pending against the company, and under which, unless some relief was afforded by the court in which the bill was filed, a large portion of the property of the company would be diverted by sales by the sheriff, and the property be thus separated and its aggregate value impaired; that, in addition to such indebted-

ness, there was outstanding a large unsecured indebtedness, on which suit would shortly be brought, unless the property were put into the hands of a receiver; that the company was insolvent and unable to meet the interest on its fixed charges or its ordinary debts and obligations; and that there was urgent necessity for the interference of the court, to protect the property from suits and executions, and to preserve it as whole, so that its business might continue to be carried on, and its income and assets be applied to the payment of its debts in due order, for the general advantage of all its creditors, and more especially to enable provision to be made by the first-mortgage bondholders for the payment of the obligations held by laborers, material-men, and others, who, under the laws of Texas, were entitled to a lien upon the property, prior to that of the first-mortgage bondholders.

The prayer of the bill was, that the rights of the creditors of the company might be ascertained and declared; that, as it was doubtful whether the Mercantile Trust Company could, under the laws of Texas, take possession of the mortgaged property, the court would appoint a receiver to take possession of it, with such power and authority in regard to the preservation and use of it as should seem best adapted to protect the interests of all the persons concerned; and for general relief. The bill was not sworn to.

On the same 14th of April, 1884, the railroad company filed an answer, signed by its president, and which had been sworn to by him on the 9th of April, 1884, which stated that there were outstanding a large number of claims for work and labor done in and about the construction of the railroad of the company, and judgments had been obtained on some of the claims, on which executions had been issued, and, although sales under them had been put off from time to time, portions of the property would be exposed to sale under the executions, unless prevented by the decree of the court; and that the property of the company would be irreparably injured by any separation of its coal and railway properties, the two being both necessary for the transaction of its business of mining coal and transporting it to market. The company submitted itself to the decree of the court.

Answer to
bill.

On the same 14th of April, 1884, an order, signed by the circuit judge, entitled in the cause, was filed, which stated that on the 9th of April, 1884, the case was heard on a motion for the appointment of a receiver, on bill and affidavits, the plaintiff and the company appearing. By the order, one Smith was appointed receiver of the company and of its franchises and all its

Order ap-
pointing re-
ceiver.

property. The order authorized the receiver to run and operate the railway, to preserve the property, to continue the mining operations and sell the coal already mined or to be mined, and out of the proceeds to pay wages, current expenses, and interest. It also directed the receiver to ascertain and report the condition of the property and of the debts charged thereon or owing by the company, and directed that, upon presenting such report, he be authorized to borrow money to pay the running expenses of the company, and to settle and pay off liens prior to the first-mortgage bonds, and all other expenses incurred by him, including his own compensation as receiver, and to issue receiver's certificates for the same, in such form and amounts as should be from time to time authorized by the court.

On the 11th of June, 1884, the court made an order directing the receiver to prepare certificates in a form given in the order, to an amount not exceeding \$25,000, which Receiver's certificates— certificates, together with such further like certificates— certificates as might be thereafter authorized by the Reference to master. court, the order stated should be a first and exclusive lien upon all the property of the company, prior to any other liens thereupon, each certificate to be for \$1,000 with interest at the rate of eight per cent. per annum, and payable out of any surplus money in the hands of the receiver after paying the running expenses of the company; that he might dispose of the certificates at not more than one per cent. discount, and that, after exhausting the receipts of the railroad, he should pay out of the proceeds of the certificates (1) the running expenses of the company which had accrued since his appointment as receiver, including the expenses of the first-mortgage bondholders in obtaining his appointment; and (2) out of the balance remaining, pay so much of the debts of the company as might be reported by the master and approved by the judge, taking an assignment of the claims to himself as receiver. That order also appointed a master to report upon all claims which should be presented to him after the publication by him of a notice calling on all persons having or asserting any claims, by judgment or otherwise, prior to the first-mortgage bonds, or entitled to a preference in payment out of the proceeds of the road, to present and file the same with him.

On the 24th of June, 1884, under that order, the said A. W. Wilcox filed with the master the following claim: "A judgment of the district court of Webb county, Texas, rendered March 27th, 1884, in cause No. 435, in favor of the said A. W. Wilcox against the said Rio Grande and Pecos Railway Company, for \$5,526.78, with

Plaintiff's
claim.

ten per cent. interest thereon from January 12, 1884, and declaring and establishing a lien on said Rio Grande and Pecos Railway and its equipments, to secure the payment of said judgment, and directing the said railway and its equipments, or so much thereof as may be necessary, to be sold to satisfy the said judgment, as will more fully appear by a duly certified copy of said judgment hereto annexed, marked 'Exhibit A,' and made a part hereof. The lien declared in said judgment is based upon money due by the said Rio Grande and Pecos Railway Company to mechanics, laborers and operatives who performed labor in the constructing and repairing and operating said railway, and thereby under the laws of Texas acquired a lien prior to all others, and that said claims so constituting a prior lien were bought by said A. W. Wilcox, and the said Rio Grande and Pecos Railway Company acknowledged the existence thereof, and promised to pay the same by its obligation and note of date January 12, 1884, upon which obligation and note the said judgment was rendered. The said judgment is unreversed and remains in full force. And the said A. W. Wilcox claims that his said lien, established by said judgment before the institution of this suit or the appointment of a receiver, is prior to the first-mortgage bonds, and is entitled to preference of payment out of the earnings and proceeds of said railway, and will apply to this court for such appropriate orders as will secure prompt payment." The claim was sworn to by Wilcox on the 23d of June, 1884.

The master filed his report upon the claims, and among them the claim of Wilcox, on the 27th of September, 1884. By that report it appears that Wright, the plaintiff in this suit, filed objections before the master to the allowance of the claim of Wilcox, on these grounds: (1)

Master's report.

that the judgment in favor of Wilcox in the district court of the county of Webb was obtained by fraud and collusion between Wilcox and the president of the company; (2) that the note was without consideration and fraudulent; (3) that, for the purpose of defeating the lien of the mortgage, Wilcox falsely represented to the district court that the note was for services and for amounts advanced on claims for labor performed in the construction and maintenance of the railroad, and that it was entitled to a lien prior to all others to secure its payment; that he was not entitled to any lien; that he performed no services and owned no claims which entitled him to such lien; that any lien was barred by the limitation of one year; that the act of the president of the company in making the note and in authorizing the confession of the judgment was *ultra vires*; and that the company was not in-

debted to Wilcox by reason of the note, and it was without consideration. The paper containing the objections also stated that Wright had, on the 19th of July 1884, filed his suit against Wilcox, in the district court of the county of Webb, to set aside and annul the said judgment on account of the acts of collusion and fraud in procuring the same, and that such suit was still pending. It also appears by the report of the master, that Wilcox introduced before the master, as evidence in support of his claim, a copy of his petition to the district court of the county of Webb, a copy of the promissory note, and a copy of the judgment of March 27, 1884, and that other evidence was put in by the respective parties, Wilcox and Wright. The master reported that the note included amounts which were not secured by a lien under the state act of 1879, as well as amounts which were. The conclusion of the master was that Wilcox had a valid claim against the company for \$5,526.78, with 10 per cent. interest from January 12, 1884; but that he had no lien prior to that of the first mortgage bondholders. On the 6th of October, 1884, Wilcox filed exceptions to the report.

On the 7th of October, 1884, the Mercantile Trust Company was duly removed from its office as trustee under the mortgage, and William S. Hassall of Philadelphia, **Sale of prop-
erty.** was appointed trustee in its place. By an order of the court, the bill was dismissed as to the Mercantile Trust Company, and Hassall, as trustee, was joined as plaintiff with Wright; and a decree was entered by consent, on the 20th of October, 1884, providing for a sale of the property at auction by the trustee, which was modified by a further decree made December 10, 1884, directing the sale of the property free from all liens, for a sum not less than \$100,000, which sum, it was stated, would cover the amount of the receiver's certificates and of the claims reported by the master. The sale was made, and the property was purchased by Wright and for the sum of \$100,000. On the 19th of May, 1885, a decree was made confirming the sale and allowing certain claims as liens prior to the lien of the mortgage, and among them the claim of A. W. Wilcox, for the sum of \$5,526.78, with interest at 8 per cent. per annum from the day of the contracting of the lien, such amount to be paid after the payment of the receiver's certificates and before any payment to the bondholders. On the 18th of June, 1885, Hassall, as trustee, appealed to this court from such decree, but the appeal was dismissed as to all the claimants but Wilcox. *Hassall v. Wilcox*, 115 U. S. 598.

Although the statute of Texas under which the superior lien of Wilcox is claimed was passed in 1879, prior to the mak-

ing of the mortgage in 1882, and although Wilcox brought his suit and obtained his judgment in the state court prior to the filing of the present bill, we do not think it can be held that the trustee under the mortgage or the bondholders were bound by that judgment rendered in a suit to which they were not made parties. Although they had a right to intervene in that suit, they were not obliged to do so, nor was Wright obliged to prosecute the suit which he brought in the state court. They had a right to come into the circuit court of the United States to contest the priority of Wilcox's lien, and, as his claim originated after the mortgage was made, compel him to prove affirmatively in that court the existence and priority of his lien, under the statute of Texas. He undertook to do so, but the master reported that he found, from the evidence, that the note on which the judgment was predicated included amounts not secured by a lien under the act of 1879, as well as amounts for which a lien was given under that act; and that Wilcox had no lien prior to the first mortgage bondholders. On exceptions by Wilcox, the circuit court sustained his exceptions, and awarded him a lien with the priority he claimed, for the full amount of \$5,526.78, with interest. We do not think the evidence before the master sustained the lien for the whole of that amount.

Trustee in mortgage not bound by judgment.

One of the exceptions taken by Wilcox to the master's report was, that the master had, by his finding, nullified the legal force and effect of the judgment of the state court. The circuit court may have proceeded on that ground, in its decree. But we do not think that the proceeding in the state court can be sustained as one *in rem*. It is essential to such a proceeding that there should at least be constructive notice, by some form of publication or advertisement, to adverse claimants, to appear and maintain their rights before a judgment in such a proceeding can operate even as *prima facie* evidence. *Windsor v. McVeigh*, 93 U. S. 274, 278, 279. In the present case, no notice, either personal or constructive, was provided for by the Texas statute, or was given to the other lienholders.

The claim of Wilcox was presented before the master and the circuit court as a claim founded wholly on his judgment and on the statute of Texas and not as a claim arising on the principle adjudged in *Union Trust Co. v. Morrison*, 125 U. S. 591, 33 Am. & Eng. R. Cas. 33, or that acted on in the case of *Fosdick v. Schall*, 99 U. S. 235, and the cases which followed it; and no facts are shown to sustain it as a claim founded on anything but the statute of Texas.

The appellant claims that the evidence before the master shows that only \$382.21 of Wilcox's claim consists of items

for which the statute of Texas gives a lien. But, as the master, though saying that the note included amounts for which a lien was given under the act, did not attempt to state what was the total of such amounts, it is proper that the decree should be reversed, and the case be remanded to the circuit court, with a direction to allow a re-examination of the claim of Wilcox, before a master, on the same and further proofs, if desired; and it is so ordered.

HARDIN *et al.*

v.

IOWA RAILWAY & CONSTRUCTION CO. *et al.*

(*Iowa Supreme Court, October 30, 1889.*)

Promissory Note—Authority to Execute—Meeting of Directors.—When it appears that the execution of a promissory note was expressly authorized at a meeting of the board of directors, it must be presumed that the directors were rightfully in session in the absence of evidence to the contrary.

Mortgage of Rolling Stock—Title of Railway Construction Company.—If, by the contract of a construction company, it is required that the railroad should be finished and turned over to the railroad company, sufficient title in the construction company is shown to support a mortgage of rolling stock executed while the construction company was in possession of the road and operating it, and before the road was turned over to the railroad company.

Promissory Note—Stipulation for Attorney's Fee—Ultra Vires.—If the board of directors of a corporation only authorizes the president and secretary to execute a promissory note for a specified sum with interest, a stipulation in the note of an attorney's fee is *ultra vires*, and invalid.

Deed of Trust—Order of Sale—Right of Way.—Where it appears that a deed of trust of real estate given by a railway construction company contains no exception of the right of way of the railroad company, the court is not authorized, in a suit to foreclose such deed of trust, to except the right of way from the order of sale.

APPEAL from District Court, Hardin County.

Action upon a promissory note executed to plaintiffs by the Iowa Railway and Construction Co., and to foreclose certain trust deeds of real estate and a chattel mortgage of rolling stock, and other securities held by the plaintiffs as collateral for the note. The court rendered a decree in favor of the plaintiffs ordering a sale of the property and both parties appealed therefrom.

H. S. Huff for plaintiffs.

John Porter and *C. E. Albrook* for defendants.

ROTHROCK, J.—1. The appeal of the defendants will first be considered. They complain that a motion for a continuance made by defendants was improperly and erroneously overruled by the court. This objection it appears to us, cannot be sustained. The continuance was asked to enable the defendants to take additional evidence. The record shows that the court was authorized in holding that ample time had been given for that purpose.

Motion for continuance.

2. Next it is claimed that the court erred in suppressing certain depositions of witnesses taken by the defendants. These depositions were taken upon notice that was both insufficient, as having been served upon a clerk or employe of plaintiffs, and as not having been served a sufficient time before the depositions were taken. On this objection, as well as upon the question as to the continuance, we are invited to a perusal of a number of affidavits of counsel as to oral agreements and understandings between them touching the taking of the evidence and the management of the case. It is scarcely necessary to say that these affidavits must be disregarded, at least so far as they are in conflict. Code, § 213.

Admissibility of depositions.

3. Both of the defendants are corporations, and, as the names indicate, they are railroad companies. As is usual when the building of a railroad is in contemplation, two companies were formed. One was the railroad company proper; that is, the projector of the enterprise. The other was the railroad construction company. The construction company undertook to build the railroad for a certain amount of the stock and bonds of the railroad company. But stock and bonds are not in and of themselves available for procuring right of way and iron, and making roadbed, and building bridges, and furnishing materials necessary to construct a railroad. It requires money. The plaintiffs are bankers, and they advanced money to the construction company, and it gave the note in suit for the money, and also gave, or caused to be given, the securities now sought to be foreclosed.

Among other objections raised by defendants to the decree, it is claimed that the president and secretary were not authorized to execute the note. This claim is not well founded. It appears that the execution of the note was expressly authorized at a meeting of the board of directors of the corporation. It is claimed that it does not appear that there was any notice to the directors that a meeting would be held. If this was material, it was for the defendants to show that there was no notice. The record shows that they met and took official action, and it should be presumed that they were rightfully in session.

Authority to execute note.

The chattel mortgage given as security for the debt was upon certain rolling stock or cars. It is claimed the mortgage is void because the rolling stock was not the property of the construction company when the mortgage was executed. We do not think this claim is well founded. The contract between the companies required that the road should be finished, and turned over to the railroad company. The evidence shows that the title to the property had not passed. The construction company was in possession of the road, and operating it, when the mortgage was given. We discover no ground for reversing the decree upon the defendants' appeal.

4. The plaintiffs complain of the decree because the court refused to allow an attorney's fee for the collection of the note.

**Stipulation
for attorney's
fee.**

It contained a stipulation for an attorney's fee if collected by an attorney, by suit or otherwise. The learned judge who presided at the hearing must have been of opinion that the president and secretary of the company who executed the note were not authorized to contract for an attorney's fee. The authority given by the board of directors to execute the note was in these words: "Eldora, Iowa, December 30th, 1884. Moved by Moorman that the president and secretary of the company be, and they are hereby, authorized to execute to the City Bank, or C. Hardin & Sons, of Eldora, this company's note for \$9,000, and a chattel mortgage upon the rolling stock of this company, to secure payment of the same due March 1st, 1885, at 10 per cent. interest, being for advances heretofore made, with interest, as well as for a \$1,000 additional to be advanced. Motion carried." This was an explicit direction to execute a note for \$9,000 and interest, and no more. The company did not, by any official action, authorize the execution of a note in any amount exceeding said sum in any event. We think the court correctly held that the measure of liability was \$9,000 and interest.

5. In providing for the sale of the property under the decree, the court made the following order, and entered it as

**Exception of
right of way
from order of
sale.**

part of the decree: "The sale of any real estate under this decree shall be made subject to the right of way of the Chicago, Iowa & Dakota Railway Company, 100 feet in width, so far as such premises are now occupied and used for the purpose of such right of way: and defendant shall have the right, if they so elect, to determine the order in which the several items of property hereinbefore referred to shall be offered for sale. To all which both parties except. It is urged that the order, in so far as it provided for a sale subject to the right of

way of the defendant, the Chicago, Iowa & Dakota Railroad Company, is erroneous. It appears to be conceded that the railroad runs across some of the tracts of land against which the decree operates; but in the deeds for the land, and the trust created therein, no exception is made, and there is nothing in the record from which it can be ascertained why this order was made. We do not think the court was authorized from the record and evidence, to make the order complained of. If the railroad company held its right of way by a title superior to the trust deeds, it should have made some showing of that fact. So far as appears from this record, it has no right of way through the lands. That part of the above order which gives the defendants the right to elect as to the order of sale of the property will be affirmed, and as to the order excepting the right of way from the foreclosure sale the decree will be reversed. In all other respects the cause will be affirmed.

UNITED STATES TRUST CO.

v.

WABASH WESTERN R. CO.

(*U. S. Circuit Court, S. D. Iowa, W. D., March Term, 1889.*)

Mortgage of Rolling Stock—Designation of Stock Belonging to Division of Railroad.—Where the mortgagor of the rolling stock of a certain division of the railroad covenants to designate in a certain manner as belonging to that division, such proportion of the whole rolling stock owned by it as the division bears to the entire railway, such mortgage only covers the rolling stock which is designated as belonging to the division named, although the mortgagor has failed to designate the quantity covenanted for.

Same—Lien—Obliteration of Designation.—Where rolling stock was purchased for, and designated as belonging to a certain division of the railroad the lien of a mortgage upon that division attaches to such rolling stock, if the rolling stock may otherwise be traced, although the designation is subsequently obliterated, as against the mortgagor, or purchasers at a sale under a subsequent mortgage of the entire railway who take with notice of the first mortgage.

IN EQUITY. Supplemental bill to determine what rolling stock belongs to the Omaha Division of the Wabash, St.

Louis & Pacific Railway. On exceptions to master's report.
Theodore Sheldon for petitioner.
H. S. Priest for defendant.

SHIRAS, J.—On the 15th of February, 1879, the St. Louis, Kansas City & Northern Railway Company executed a mortgage to the United States Trust Company on the line of railway extending from Council Bluffs, Iowa, to Pattonsburg, Mo., which was then about to be constructed; and which, when built, was known as the Omaha Division, and which formed part of the system of lines consolidated under the name of the Wabash, St. Louis & Pacific Railway. By its terms the mortgage was to cover the rolling stock belonging thereto; and for the purpose of designating the same and distinguishing it from the rolling stock appurtenant to the main line and other branches of the road, it was provided in the mortgage "that the party of the first part will mark in some substantial manner all engines and cars of each and every class hereafter purchased by it, with the words 'Omaha Division,' until such time as the engines and cars so purchased and marked shall bear the same proportion to the number of miles of railroad hereby mortgaged and conveyed that the whole number of engines and cars of each and every class now owned by the party of the first part bears to the whole number of miles now owned by it. And the party of the first part further agrees that it will hereafter at all times keep the rolling stock designated as belonging to the railroad hereby conveyed equal in value and amount per mile to the amount of rolling stock per mile on the entire line or lines of railroad owned by said party of the first part, its successors and assigns." On the 1st day of June, 1880, the Wabash, St. Louis & Pacific Railway Company executed a mortgage covering the several lines operated by that company, and including the line known as the "Omaha Division." A bill for the foreclosure of this mortgage was brought, and also one for the foreclosure of the mortgage first above mentioned. Messrs. Humphrey & Tutt were appointed receivers in the first named foreclosure, and Thomas McKissock in the latter, and under the authority of the courts a temporary arrangement was made between the receivers regarding the use of the rolling stock, under which the several lines have been operated. Decrees of foreclosure in the several proceedings have been entered, and the present proceedings have been instituted for the purpose of determining finally what rolling stock is appurtenant to the Omaha Division, in such sense that the mortgage of February 15, 1879, became a lien thereon paramount to the lien of the general mortgage of June 1, 1880. The is-

sue was referred to the master, and he has reported his findings thereon. Both parties excepting to the report, the case is now before the court upon such exceptions.

The findings of the master show that the covenant in the mortgage, that the mortgagor would equip the Omaha Division with rolling stock proportionately equivalent in amount to that used upon the other portions of the system, has not been performed, and it is claimed on behalf of the present purchasers that the deficiency should be made good by assigning a sufficient number of cars out of the general equipment of the Wabash, St. Louis & Pacific Railway to make the equipment equal to what it would have been had the covenant been performed. If this were done, the cars so taken would reduce to that extent the security of other mortgagees, who are not in fault. If no other interests were involved, save those of the mortgager and the mortgagees of the Omaha Division, it might be that specific performance of the covenant in this particular could be decreed, but whether the decree would be for the assignment of specific rolling stock already in the possession of the company or for the purchase of other stock would be an open question, and it is doubtful whether a court of equity would undertake to give relief in this form. But however this may be, it is clear that when the question is presented, as it now is, upon this record, the court is not justified in attempting to enforce the covenant in the manner indicated. The liens of other mortgages have attached to the equipment in question and the court is not justified in attempting to displace or defeat these liens, in order to make good to the mortgagees of the Omaha Division the loss resulting from the breach of the covenant in their mortgage. Practically it is a question of lien, and the mortgagees under the latter mortgage are entitled to assert a claim only to such rolling stock as in fact became subject to the lien of the mortgage of February 15, 1879.

Covenant to designate rolling stock.

The master in his report has set forth the number of engines and cars which were purchased for the Omaha Division as provided in the mortgage and which were designated as therein provided. When so purchased and designated the lien of the mortgage attached thereto as a prior lien, and under the foreclosure of the mortgage and the sale based thereon the title to this rolling stock passed to the purchasers at such sale. On behalf of the Wabash Western Railway Company, which holds title under the foreclosure of the mortgage of June 1, 1880, it is claimed that as a purchaser at such sale, this company has the title to all the engines and cars which did not at the date of the sale have upon them the words "Omaha

Division." The evidence shows that, in the lapse of time and by various means, the words "Omaha Division" originally placed upon the rolling stock purchased for that division had been removed or lost from many of these engines and cars, and it is now contended that thereby such rolling stock became intermingled with the general equipment of the Wabash, St. Louis & Pacific Railway Company, and the lien of the mortgagees of the Omaha Division was destroyed as against the purchaser at the foreclosure sale of the mortgage of June 1, 1880. It was unquestionably the duty of the mortgagor, under the provisions of the mortgage of February 15, 1879, to keep the rolling stock purchased for the Omaha Division properly marked and designated. If, while the engines and cars were in its possession, it caused or permitted the designating marks to be removed or obliterated, such

Obliteration
of designa-
tion.

neglect of duty on its part would not have the effect of releasing the lien of the mortgage as between the mortgagor and the mortgagees. It will also be borne in mind that other means of identification of this rolling stock existed, as the same could be traced by the numbers thereof, and by the fact of its general use upon the line of the Omaha Division. The lien of the mortgage of February 15, 1879, having once attached to the rolling stock by its purchase for the Omaha Division and by its proper designation, would not be destroyed as against the mortgagor or those in privity with it, by reason of the fact that the mortgagor had permitted the marks to be obliterated upon such rolling stock. What the rights of one who should have purchased one or more of these cars at a public sale thereof might be held to be it is not necessary to consider. The title represented by the Wabash Western Railway Company is based upon the lien of the mortgage of June 1, 1880. The sale under the foreclosure of that mortgage was not of any specific cars, but of the line of railway and the rolling stock appurtenant thereto. When this sale took place, the purchasing committee, who bought in the property, knew of the existence of the mortgage on the Omaha Division and of the lien created by that mortgage on the rolling stock appurtenant thereto, and the record showed that there would have to be an apportionment of the rolling stock among the several branches. It cannot be successfully maintained, under the peculiar facts of this case, that the purchasing committee were innocent purchasers for value of the rolling stock in question, and as such took the same free from the lien of the mortgage of February 15, 1879. The finding of the master, therefore, that the petitioner is entitled to claim the engines and cars which were purchased for the Omaha Division and placed thereon with the proper designating marks is sustained.

Part of such rolling stock has already been delivered to the receiver for the Omaha Division. Such portion thereof as has not been so delivered, should forthwith be transferred to the Omaha & St. Louis Railway Company. If, as is asserted, any one or more of these engines and cars have been destroyed, such fact, of course, excuses the delivery thereof in kind. Whether a claim for damages for such destruction exists is not adjudicated, not being now in issue. What the Omaha & St. Louis Railway Company is now entitled to is a decree declaring specifically the rolling stock which was covered by the lien of the mortgage of February 15, 1879, and declaring that company, as the purchaser at the foreclosure sale, to be the owner thereof, and entitled to demand and receive possession thereof wherever said rolling stock may be found, and further directing the Wabash Western Railway Company to deliver to said Omaha & St. Louis Railway Company all of the named engines, cars, or rolling stock which may be now or may hereafter come into its possession or under its control.

SPIES

v.

CHICAGO & EASTERN ILLINOIS R. CO.

(U. S. Circuit Court, Southern District, New York, October 10, 1889.)

Income Mortgages—Interest—Deduction of Operating Expenses from Receipts—New Lines.—Where the granting clause of a railway income mortgage subjecting to the lien the "line of railroad belonging or hereafter to belong" to the mortgagor, is qualified by a description of the line which follows it, and the directors are required to set apart for payment of the interest on the income mortgage bonds, the net income derived from the road after deducting operating expenses and betterments requisite to maintain the line of railroad in first class condition, the mortgage security is limited to the roads then belonging or thereafter to belong to the railroad company within the *termini* specified, and the directors cannot deduct from the fund for the payment of the interest, operating and other expenses in connection with new lines acquired by the company.

Same—Resolution that no Interest Earned—Validity.—When a railway income mortgage provides that the board of directors shall deduct from the gross income, the necessary operating expenses and betterments required to maintain the road in first class condition, and declares that if the board of directors shall adjudge that no net income has been realized during the

year applicable to the payment of interest on the mortgage bonds, they shall thereupon enter a resolution to that effect, on the journal of their proceedings, and the adjudication shall be final and conclusive as an award, and shall operate as a bar against any demand by any bondholder for interest for that year, the bondholders are entitled to have an honest effort on the part of the directors to ascertain the net earnings of the railroad, and the mere passing of a resolution that no income has been earned without an attempt to ascertain the fact, is not a compliance with the terms of the contract.

Same—Averment of Fraud—Decree.—Where a suit is brought at the instance of income mortgage bondholders, alleging that the board of directors of the corporation has fraudulently failed to set apart the net earnings of the road for the payment of interest, no relief can be had in such action if the complainant fails to show fraud on the part of the directors, even though it appears that the directors had erroneously diverted the income to other purposes.

BILL in equity for an account.

John W. Weed for complainant.

Austen G. Fox for defendant.

WALLACE, J.—The cause has been brought to hearing upon bill and answer, with a stipulation admitting that the complainant's title to the bonds which are the foundation of his claim is to be deemed as established by the pleadings. The complainant is the owner of certain income bonds secured by a mortgage executed in 1877 by the defendant, pledging the net earnings of its line of railway for the payment of interest. The mortgage includes "all and singular the line of railways belonging or hereafter to belong to the party of the first part, and extending from Chicago, Cook county, Ill., through the counties of Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, together with a branch from Bismarck's Junction easterly through Warren and Fountain counties, Ind., to Snoddy's Mills, and its equipments and appendages, and the net income thereof." The bonds are conditioned for the payment of such interest on the principal, not to exceed 7 per cent. for any one year, as shall be declared and fixed by the board of directors in each year in accordance with the mortgage. The mortgage provides that in each year during the currency of the bonds, beginning with the year 1878, the board of directors shall in the month of October ascertain, fix, and declare what amount of net earnings has been made during the preceding fiscal year ending the 1st day of September, and is justly applicable to the payment of interest on such issue of income bonds; and in such ascertainment of net earnings there shall be deducted from the gross income all operating expenses, taxes, insurance, liability for either interest or sinking fund on any of the existing bonds of the company, necessary rentals, and pur-

chase or hire of equipments, together with such expenditures for renewals, repairs, and betterments as may be proper and requisite to maintain the line of railroad and its appendages in a first class condition for effective service; and that, after deducting all such payments, expenses, and liabilities from the amount of gross income received during the year, the board of directors shall thereupon fix, establish, and adjudge whether any, and, if so, how much, net income exists which is applicable to the payment of interest on the said issue of income bonds. The mortgage further provides that if on such ascertainment the board of directors adjudge that no net income has been realized during the year applicable to such interest payment, they shall thereupon enter a resolve to that effect on the journal of their proceedings, and the adjudication shall be final and conclusive as an award, and shall operate as a perpetual bar against any claim or demand of any holder of such income bonds for the payment of interest for such year; and that, if the said board shall, on such ascertainment of net earnings, adjudge that a specific sum is available out of the net earnings for such interest payment, then a resolve shall be entered in their minute of proceedings in the nature of a final and conclusive award, fixing and declaring what ascertained sum is properly available out of that year's net earnings for the payment of interest on such income bonds, and the payment or rate of interest to be allowed and paid. The mortgage further provides that no right of action shall exist in favor of any holder of such income bonds for any alleged liability for interest, until the same shall first be adjudged and awarded as aforesaid. The bill alleges that prior to September 1, 1883, interest on the bonds had been ascertained and declared by the board of directors, and duly paid to the holders of the bonds; but that thereafter the defendants and its officers and board of directors conspired to fraudulently compel the complainant and other holders of said income bonds to surrender the same, and exchange them for consol bonds subsequently created, and to fraudulently withhold at first a portion and then the whole of the net earnings which were properly payable upon said bonds; and with a view to carrying this evil design into effect they willfully, maliciously, and fraudulently failed to make any true ascertainment in the month of October, 1884, or in the month of October, 1885, of the net earnings for the preceding fiscal year, and willfully made a fictitious, false, and fraudulent ascertainment of the same, whereby they sought to make it appear that nothing had been earned on account of such interest; and that the officers and board of directors well knew at the time of each of said pretended as-

certainments that the net earnings, if the same had been ascertained in the manner prescribed by the mortgage, were more than sufficient to have paid 7 per cent. interest upon the principal of said bonds. The bill then sets out what devices were resorted to by the board of directors to cover up and defraud the holders of income bonds out of the net earnings properly applicable to interest thereon—among others, the mingling of the accounts of the division of the railway covered by the mortgage with the accounts of consolidated, constructed, and leased lines acquired by the defendant after the execution of the mortgage, including charges for additional equipment for the new lines. The answer fully meets and denies all the averments of fraud and conspiracy, but it admits that separate accounts have not been kept by the defendant of the net earnings of the original lines; that the accounts of the earnings and expenses of these lines and those subsequently acquired have been mingled together; and that the board of directors did not attempt to make any ascertainment in 1884 or 1885 of the net earnings of the original lines. It appears by the bill and answer that the new lines built, acquired, or leased by the defendant embrace a large mileage, and have cost the defendant a large sum of money; and that in June, 1884, the defendant issued consol bonds bearing interest at 6 per cent. per annum, secured by a mortgage upon its property, which have been used in part to pay for the new lines and their equipment, and has used part of its earnings to pay interest thereon. The bill prays for an accounting, and a decree for the payment of what is ascertained to be due from the defendant.

When the case was before the court on a former occasion upon a demurrer for want of equity, and alleging that the trustee named in the income mortgage was a necessary party, the demurrer was overruled by Judge WHEELER (30 Fed. Rep. 397). The questions then considered and decided adversely to the defendant cannot be appropriately reconsidered now. It must be held, therefore, for present purposes, that the complainant is entitled to the relief sought, unless the material averments of the bill are sufficiently met and denied by the answer.

Under the terms of the income mortgage it was the duty of the defendant to keep an account of the earnings, expenses, and net income of the lines included in the mortgage, as distinct from those subsequently acquired. The granting clause in the mortgage subjecting to the lien the "line of railway belonging or hereafter to belong" to the defendant is qualified by the description of the line which follows it; and the words "here-

Deduction of
expenses of
operating new
lines.

after to belong" refer to such lines between the specified termini as the company did not then own—like the road from Chicago to Dalton then leased by the company, and constituting the link by which its line of railway extended from Chicago to Danville. If the mortgage provides expressly or by implication that the board of directors are to set apart the income of the railway lines particularly described for the payment of the maturing interest upon the bonds, the bondholders are entitled to that income; and their pledge is not to be transmuted from one upon the earnings of a particular line of railway to one upon the earnings of a system of which the line may be a part. This would dilute their security upon a designated fund into a nebulous lien upon the profits of such new enterprises as the corporation might see fit to undertake. The terms of the mortgage are that in ascertaining net earnings there is to be deducted from gross income expenditures or liabilities for ordinary expenses, interest, or sinking fund requirements, and for renewals, repairs, and betterments requisite to maintain the line of railroad in a first-class condition. All this detail of specification would be unnecessary if the mortgage were not intended to define carefully what expenses and liabilities may be treated as an offset to gross income, and limit the offset to those incurred in the operation and improvement of the particular lines described. Within this limitation the amount that may be appropriated for the specified objects, and the manner in which the railway lines may be managed, are matters resting exclusively in the discretion and good faith of the directors.

An income railway mortgage, although it is a pledge of tangible property for the payment of the principal sum, is, as a security for the payment of interest, but little more than the pledge of the good faith of the company in managing its lines. It necessarily contemplates that such improvements as seem necessary to the efficient use and operation of such property, and such alterations in the *corpus* as appear desirable, are to be made, at the discretion of the directors; and unless it contains some limitations upon the powers of the directors, express or implied, the right of the company to conduct its operations as it may see fit, subject only to the conditions of its organic law, is unqualified; and consequently the company can lawfully extend its lines, acquire new ones, discontinue old ones, and thus essentially change the earning capacity of the property. It is important, therefore, that any limitations upon the general powers of the directors, intended to define the boundaries of their discretion, should be given due effect if such a mortgage is to afford any substantial security to bondholders for the payment of their interest; and

if these are found in the instrument they should not be nullified by a latitudinarian interpretation calculated to relegate bondholders to the position of stockholders. They are not stockholders; but creditors, who contract upon the assurance that the income fund upon which they rely when they purchase the bonds is to continue to exist during the life of the mortgage. When the mortgage implies that the income fund is to consist of the profit of the future transactions of the company from all sources, as may be the case when the property pledged to the fund includes not only what is owned by the company at the time of the execution of the instrument, but also all that may be thereafter owned or acquired by the company, the bondholders cannot complain if, when the interest periods occur, it is found that the profits which would have been made by operating the original lines exclusively have been depleted by the losses arising from the operation of new lines in conjunction with the old ones. *Day v. Town of New Lots*, 107 N. Y. 148; *Buck v. Seymour*, 46 Conn. 156. But where, as here, the terms are that specific lines are granted, and that income is to be ascertained by taking the gross earnings of those lines and deducting from them specified expenses and liabilities, the bondholders are entitled to hold the company to its promise. It is to be inferred that they have invested upon the faith of the earning capacity of the particular property, basing their expectations for the future upon the results of the past, and not intending to trust wholly to the integrity and good judgment of a body of directors whose *personnel* may change at any time.

The case, then, presents the question whether the board of directors are justified in deducting the expenditures and expenses, including interest charges, incurred by operating the new lines acquired by the company from the earnings of the original lines. Clearly they are not, unless these new lines are to be deemed "betterments requisite to maintain the line of railway [described] in first-class condition." The mere statement of the proposition is the only answer it requires. If it is said that the successful operation of the old lines may have demanded the acquisition of new ones, the answer is that, nevertheless, the income fund consists of the earnings of the old lines, less the expenses of operation, and the bondholders have the right to look to that fund exclusively. The mortgage intrusts the directors with a wide discretion in determining what is to be treated as net income. Their conclusions, when embodied in a resolution of the board, are not vitiated by an error of judgment, and can only be disturbed when the circumstances establish bad faith. But their duty to

Resolution
that no interest
payable.

the bondholders requires them to make an honest effort to ascertain the net earnings of the original lines at the several interest periods; and this they have not done; nor can they do so practically, unless a separate account of the earnings and expenses of those lines are kept. *Barry v. Missouri, K. & T. R. Co.*, 27 Fed. Rep. 1, 29 Am. & Eng. R. Cas. 384; *Mackintosh v. Flint & P. M. R. Co.*, 34 Fed. Rep. 582, 36 Am. & Eng. R. Cas. 340. The perfunctory ceremony of passing a resolution that no income has been earned, without an attempt to ascertain the fact, is not a compliance with the letter or the spirit of the contract. The condition in the bonds and mortgage, whereby the interest is payable as and when fixed by the action of the board of directors, does not preclude the bondholders from all remedy whenever the directors improperly neglect or refuse to take the necessary action. No corporation can shelter itself behind a contract that it shall not be liable for its own wrongful acts.

It has seemed proper to consider these questions fully, because both parties are anxious for the opinion of the court as to their respective rights and obligations under the bonds, and the argument at the bar has been principally directed to the discussion of them. Nevertheless no relief can be granted to the complainant under the present bill, because, having alleged a case of fraud, he cannot be permitted to support it on any other ground. *Wilde v. Gibson*, 1 H. L. Cas. 626; *Eyre v. Potter*, 15 How. (U. S.) 56; *Fisher v. Boody*, 1 Curt. (C. C.) 206; *Price v. Berrington*, 7 Eng. Law & Eq. 254. The present bill does not even proceed upon the ground of a willful neglect of duty on the part of the directors of the defendant to make the ascertainment and adjudication respecting the income provided for in the mortgage, but it charges them with actual fraud and conspiracy designed to compel the complainant to surrender his bonds and accept consol bonds in lieu, and alleges the failure to make the ascertainment as one of the evidential facts supporting the conspiracy. There is nothing in the facts, as they appear by the pleadings, to justify any inference of *mala fides* on the part of the directors; and it would seem that they have acted under an honest misapprehension of their duties to bondholders, supposing that the position contended for by their counsel was correct, and that the income of all the lines, the new as well as the old, was the fund pledged by the mortgage. The bill is therefore dismissed, with costs.

Under pleadings relief can only be granted for fraud.

Income Mortgages—Obligation of Trustees or Directors to Account for Earnings.—See *Dow v. Memphis & L. R. R. Co.* (U. S.), 33 Am. & Eng. R. Cas. 12, note 15; *Barry v. Missouri, K. & T. R. Co.* (C. C.), 29 *Id.* 384.

CHIPPEWA VALLEY & S. R. Co.

v.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R. Co. *et al.**(Wisconsin Supreme Court, December 3, 1889.)*

Contract to Aid in Obtaining Land Grant—Validity—Public Policy.—A contract between two railroad companies, by which one of them agrees in consideration of the undertaking of the other to convey to it part of a land grant, to refrain from making application to the legislature for such land grant, and to aid the other company in obtaining it, is contrary to public policy and void, although the services to be rendered are expressly limited by the contract to such as are reasonable and proper.

APPEAL from Circuit Court, Dane County.

The amended complainant, in effect, alleges the incorporation and organization of the plaintiff, usually called the "Chippewa Company," on June 15, 1881. That thereupon the work of locating and constructing its railway was commenced and prosecuted until the fall of 1882, when the same was completed from the Mississippi to Eau Claire, with a branch from near the mouth of the Red Cedar river by way of Menominee to Cedar Falls, and from that time the same has been operated as a railway company engaged in the business of a common carrier. That the defendant the Chicago, St. Paul, Minneapolis & Omaha Railway Company, usually known as the "Omaha Company," was organized during all the times hereinafter mentioned. That June 15, 1881, it was the owner, among other things, of a railway extending from Elroy, through Eau Claire, to Hudson, and thence to St. Paul. That it was also the owner of a railway from Hudson, in a northeasterly direction, a distance of 120 miles, known as the "North Wisconsin Railway." That June 15, 1881, the defendant, the Chicago, Milwaukee & St. Paul Railway Company, usually known as the "St. Paul Company," was engaged in operating railways in the states of Wisconsin, Illinois, Minnesota, and Iowa, and the territory of Dakota. That one of its lines extended from La Crosse, by way of Wabasha, in Minnesota, to St. Paul. That about 3,000 miles thereof was in the states of Minnesota and Iowa, and the territory of Dakota, constructed over prairie lands almost entirely destitute of timber and lum-

ber. That said Chippewa Company was organized by parties interested in and friendly to the St. Paul Company, with a view of connecting the lines of said last-named company with the extensive prairies and timber lands in northwestern Wisconsin, and of reaching the parts of Lake Superior, and connecting them with said system of railways, and operating the same in connection with the St. Paul Company, and eventually transferring the same to the St. Paul Company, to be made a part of and be operated with it as a part of its system. That with that view it determined to and did construct said Chippewa Railway. That arrangements were made by said company for the extension of said railway from Cedar Falls, on this route, to Lake Superior, passing over the line of that part of the land grant hereinafter mentioned, more particularly from Superior to the point of intersection at or near Veazie with the North Wisconsin Railway. That, at or about the time of the organization of the plaintiff company there was organized a railway company, by the name of the "Chippewa Falls & Northern Railway Company," with the object of constructing a railway from Chippewa Falls in a northerly direction, by way of Chetek, Rice Lake, and said land grant intersection at or near Veazie, and thence, either by its own line or a branch of said Omaha Company, to Superior. That that company was organized in the interest of said Omaha Company, and by the officers thereof, and controlled and substantially owned by that company. That it proceeded, with the assistance of said Omaha Company, to construct its road from Chippewa Falls, on the route indicated, towards Superior. That the Omaha Company subsequently and prior to January 10, 1882, acquired the ownership in form of said road so commenced and partially constructed by said company, and is now the owner thereof. That the lines of railway proposed to be constructed by the plaintiff and by the Chippewa Falls & Northern Railway Company and said Omaha Company were identical from Chetek northerly to Superior, a distance of about 125 miles. That by the acts of congress of June 3, 1856, and May 5, 1864, grants of land, described, were made to Wisconsin, among other things, for the construction of a railway from Madison or Columbus, by way of Portage City, to St. Croix, at a point described, and from thence to the west end of Lake Superior, and to Bayfield, upon the conditions named. That March 4, 1874, the legislature of the state accepted said grants, and thereupon granted to the Chicago & Northern Pacific Air-Line Railway Company all the right, title, and interest which the state then had, or might thereafter acquire, in or to that portion of the lands granted by said acts of congress as was or could be made applicable to

the construction of that part of the railway lying between the points of intersection mentioned and the west end of Lake Superior, upon the express condition that said last-named company should construct, complete, and put in operation that part of its said railway above mentioned as soon as a railway should be constructed and put in operation from Hudson to said point of intersection, and within five years from said last-mentioned date, and should also construct and put in operation a railway from Genoa northerly at the rate of 20 miles per year; which said grant was duly accepted by said last-named company, May 1, 1874. That the name of said last-named company was afterwards, and about 1874, changed to the Chicago, Portage & Superior Railway Company, commonly known as the "Portage & Superior Company." That by an act of the legislature of the state approved March 16, 1878, the time limited for the construction and completion of said last-named railway was extended for the term of three years, or to about May 1, 1882. That for more than two years prior to January 10, 1882, a railway had been completed and put in operation from Hudson to said point of intersection, as stated, but that said Portage & Superior Company had not, on or prior to said last-mentioned date, completed or constructed any portion of said land-grant road from said point of intersection to Superior, and had not constructed or put in operation any part or portion of any railway, and was not the owner of any railway whatever. That said last-named company was then wholly insolvent, and unable to complete or build any portion of said land-grant road, or put the same in operation, and that it had no means or ability to complete, construct, or operate a railway, and no property of any kind or description. That one Barnes, of New York, was the owner of nine-tenths of the *bona fide* stock thereof, and was, January 10, 1882, and for several weeks prior thereto had been, offering to sell his stock entire, with the control of said company, and all the franchises thereof, to different parties, especially to the plaintiff and the St. Paul Company and the Omaha Company. That it was well understood by all parties that the said land-grant would lapse to the state on May 1, 1882. That the plaintiff, in its own behalf, and in the interest of the St. Paul Company, and the Omaha Company, were both proposing to apply to the legislature for said grant, and were both proposing to construct their line of road over the line of said land-grant road; and, in view of the facts stated, the plaintiff and the Omaha Company, respectively, were proposing to ask the legislature to confer said land-grant upon them, and thus prevent the grant from lapsing and reverting to the United States, and thereby

be lost to the state. That it was apparent to both parties that in case the plaintiff, aided and assisted by the St. Paul Company and the Omaha Company, should enter into a contest before the legislature for that grant, they might defeat each other, and that no disposition of said land-grant would be made, and that said road would not be constructed, and that said land-grant would probably fail of its object and become forfeited. That it was manifest that only one road from the Chippewa valley, on the line indicated, to Lake Superior, was needed by the public for the transaction of business, and that, if an agreement could be made by which both the companies interested could have traffic arrangements over the road to be constructed, all parties would be better accommodated, and all interests better subserved, than by the construction of two parallel and competing lines. That in view of the situation, and on January 10, 1882, said companies met, by their respective representatives and officers, and entered into a contract in due form of law, in the words and figures, omitting signatures, following:

"This agreement, made this 10th day of January, in the year A. D. 1882, between the Chicago, St. Paul, Minneapolis & Omaha Railway Company, party of the first part, and the Chicago, Milwaukee & St. Paul Railway Company, party of the second part, witnesseth, the party of the first part, in consideration of the agreements of the party of the second part hereinafter expressed, agrees: (1) That in case the party of the first part shall obtain the land grant heretofore granted to the Chicago, Portage & Superior Railway Company in the state of Wisconsin, either by grant of the legislature or negotiation with the said Chicago, Portage & Superior Railway Company, or by both such grant and negotiation, the said party of the first part will give to the said party of the second part one equal fourth part of the lands received under said grant. (2) That it will grant to said party of the second part all rights, franchises, and property which it may obtain from the said Chicago, Portage & Superior Railway Company south of the junction of said road with the main line of the North Wisconsin Railway, including all grade and right of way of said company between said junction and the city of Chicago, which the party of the first part may acquire. (3) That it will make a contract of lease with the said party of the second part, giving said party of the second part an equal right with the party of the first part to run its trains from Chippewa Falls (or, if the party of the first part shall construct a road from Eau Claire to Chippewa Falls, then from Eau Claire by way of Chippewa Falls) to Superior City, upon the following terms: The party of the second part shall pay

to the party of the first part six per cent. interest per annum upon one-half of the actual cost, upon a cash basis, of said railroad, and shall also pay for repairs of the same upon the same, upon the basis of wheelage. The option to take this agreement of lease shall remain to the party of the second part for the term of six months from the time the road is completed so as to admit of the running of trains through from Chippewa Falls to Superior City. The party of the first part further agrees that it will not extend its Neillsville line, and both of the parties hereto agree that they will not extend their lines into the territory between Beaver, on the Wisconsin Valley Railroad; Neillsville, on the Chicago, St. Paul, Minneapolis & Omaha Railroad; Abbottsford, on the Wisconsin Central Railroad,—without a further agreement between them. In consideration of the above agreement, the said party of the second part hereby agrees that it will not make any efforts to procure said lands to be granted to it, or aid or assist any other party to procure the same, except the said party of the first part, and that it will render to said party of the first part all reasonable and proper assistance which it may be able to give in procuring said land grant to be given to the said party of the first part by the legislature, and will aid said party of the first part in any negotiation that it may set on foot with the said Chicago, Portage & Superior Railroad Company for the purpose of acquiring the same. It is further agreed and understood that in case it shall become necessary to pay the said Chicago, Portage & Superior Railway Company any sum of money in order to procure an assignment of its interest in said grant, that the party of the second part shall pay its proportion of said amount, being as one to three, or relinquish all right to any portion of said grant. It is further understood and agreed that the question of the amount of land pertaining to said grant, and the division thereof between said companies as above provided, shall be left to the determination of Philetus Sawyer and Alexander Mitchell, and that their decision upon that subject shall be final and conclusive between the parties. In testimony whereof the parties to these presents have caused the same to be executed by their respective presidents, and their corporate seals to be affixed hereto, attested by their respective secretaries, the day and year first above written."

That said contract was in fact executed by the St. Paul Company in its own behalf, and as representing the plaintiff. That the plaintiff and the St. Paul Company, in good faith, relying upon the agreements of said Omaha Company in said contract contained, made no application to the legislature, then just convening, to have said land grant conferred upon

the plaintiff, and ceased all negotiations then pending between the plaintiff and said Portage & Superior Company, and between the St. Paul Company and said Portage & Superior Company, for the purchase of the stock and property of said company, and rendered to said Omaha Company all such reasonable and proper assistance as they were able to give in the negotiations between it and said Portage & Superior Company for the purchase of said grant. That, immediately after the making of said contract, the Omaha Company renewed its negotiations with the Portage & Superior Company, or the agents of said Barnes, for the purchase of said stock, property, and rights thereof. That said negotiations soon thereafter resulted in such purchase. That the actual transfer of said stock, after said negotiations were completed, was, by the direction of the Omaha Company, made to one Cable, a friend of said company, who took the transfer thereof to himself, in his own name, but for the benefit of the Omaha Company. That the whole consideration therefor was paid to Barnes by the Omaha Company. That subsequently, Cable transferred all of said stock to the Omaha Company, or to some other person for its benefit. That, as such owner, the Omaha Company consented to the legislation thereafter prosecuted, resuming said land grant to the state, and conferring the same upon the Omaha Company. That, in consequence thereof, no objection was made by the Portage & Superior Company, or the parties entitled to represent the same, but in fact consented thereto. That, immediately after said purchase, the Omaha Company applied to the legislature to resume said grant from said Portage and Superior Company, and to confer the same upon the said Omaha Company, and prepared a bill for that purpose, which was introduced in the legislature and passed, the same being chapter 10 of the Laws of 1882, approved February 16, 1882. That in and by said act the legislature revoked and annulled the said land grant theretofore held by the Portage & Superior Company, and conferred the same upon and granted it to the Omaha Company, with all the right, title, and interest which the state then had or might thereafter acquire in and to the lands granted to said state by said acts of congress to aid in the construction of such railway, which were applicable under said acts to the construction of that portion thereof which lay between the west end of Lake Superior and said point of intersection. That said grant was upon the express condition that the Omaha Company should continuously proceed with the construction of the railway then in part constructed by it between said point of intersection and the west end of Lake Superior, and should complete the same so as to admit of the running of

trains thereover on or before December 1, 1882; and upon such completion the Omaha Company became entitled to patents for all lands applicable under said acts to the land grant road so constructed. That in making such purchase and the passage of said act the St. Paul Company and the plaintiff, in pursuance of the contract above set forth, rendered to the Omaha Company all such reasonable and proper assistance as they were able to give in the premises, and the St. Paul Company and said plaintiff in good faith in all respects observed, performed, and to their utmost ability carried out the terms and provisions of said contract. That thereby said grant was conferred upon the Omaha Company. That June 10, 1882, and while the Omaha Company was engaged in constructing said railway, the St. Paul Company and the plaintiff applied to the Omaha Company, and requested that said contract so executed January 10, 1882, should be so changed as to make the plaintiff a party thereto, to which said Omaha Company consented; and thereupon a tripartite contract was prepared between them, and executed making the Omaha Company party of the first part, and the St. Paul Company party of the second part, and the plaintiff party of the third part, and dated as of January 10, 1882. That by the contract so modified the Chippewa Company was thereby entitled to the benefits of the first, third, and part of the fourth subdivisions of the contract, and the St. Paul Company the benefits of the second and part of the fourth subdivisions. That otherwise said second contract was a copy of the first. That at the same time, and in consequence thereof, the contract so made January 10, 1882, was surrendered and canceled. That prior to December 31, 1882, the Omaha Company constructed such railway between said point of intersection and the west end of Lake Superior, a distance of about 62 miles, and completed the same so as to admit of the running of trains over the same, on or before December 1, 1882, and thereby became entitled to the land so granted to it by chapter 10, Laws 1882, and entitled to receive patents therefor. That said lands amounted to about 400,000 acres, which were so granted to the Omaha Company, and the same were mostly covered with a heavy growth of pine and other valuable timber, and were at the time of said last named grant, of the value of \$2,000,000 and over. That, during 1882, the Omaha Company also constructed a line of railway, formerly known as the "Chippewa Falls & Northern," but now as a part of the Omaha Company's lines, from said Chippewa Falls to within about 10 miles from the said point of intersection, and prior to June 1, 1883, the Omaha Company completed such line or road to Veazie, the said point of intersection. That on June 1, 1883,

the said railway was completed from Chippewa Falls to Superior, so as to admit of the running of trains through thereon. That, on or about May 1, 1883, the Omaha Company commenced the construction of a line from Chippewa Falls to Eau Claire, and has nearly completed the same, and the same will be ready for the running of trains thereon, on or before September 1, 1884. That when completed it will form a continuous line of railway from Eau Claire, by way of Chippewa Falls to Superior, completing the Omaha road. That the Omaha Company has received such patents, or claims the right to the same, and has sold and disposed of a large amount of the lands so patented, and parted with the title thereof to third parties, unknown to the plaintiff. That it has also sold and disposed of a large quantity of the timber on said lands to various parties, who have taken and converted the same to their own use. That the plaintiff has in all respects kept and performed, or offered to perform, each and all the conditions and terms of said last named contract to be kept and performed by it. That the plaintiff had notified the Omaha Company that it had elected to take the contract or lease mentioned in the contract, but that the Omaha Company has hitherto refused, and still refuses, to inform the plaintiff of such amounts, or any of them, and does refuse to convey to the plaintiff any part of said lands, and does refuse to grant unto the plaintiff any contract or agreement giving to the plaintiff an equal right with the Omaha Company to run its trains as specified in the contract, and has utterly refused to carry out or comply with the terms of said contract on its part. The complaint prays the specific performance of said second contract, and for an accounting and injunction.

To that complaint the Omaha Company demurred, on the ground that it did not state facts sufficient to constitute a cause of action, and from the order overruling such demurrer the Omaha Company brings this appeal.

S. M. Pinney and C. M. Osborne for appellant.

John W. Cary for respondent.

CASSODAY, J.—This action is brought to enforce the specific performance of the contract or contracts set forth in the foregoing statement. By virtue of those contracts the plaintiff claims the right to the equal undivided one-fourth of all the lands and the avails thereof granted to the state for the purpose of aiding in the construction of a railroad from Superior to the junction near Veazie,—a distance of about 62 miles—and said to contain 400,000 acres of land, of the value of \$2,000,000. The state granted all of those lands to the Portage & Superior Company in 1874, for

Case stated.

the purpose named and upon the conditions set forth in said statement; and that company continued to hold the same down to the time of executing the first of said contracts, January 10, 1882. It had failed, however, to construct any portion of the 62 miles of road between Superior and the junction, as required by such grant, and it had also failed to construct any portion of the road from the state line at Genoa to said junction, as required by such grant. It was, moreover, then insolvent and wholly unable to complete any part of either of such roads, and the owner of nine-tenths of the *bona fide* stock of that company was then offering to sell the same to different parties, and particularly to the Chippewa, St. Paul, and Omaha Companies respectively. The fact of such insolvency and default on the part of the Portage & Superior Company, and the further fact that the time limited in the grant for its completion of the entire road would expire about May 1, 1882, had, prior to the execution of the contract, January 10, 1882, induced the Chippewa Company in its own behalf, and in the interest of the St. Paul Company and the Omaha Company respectively, to apply to the legislature, then about to convene, for said grant, and to ask that the same be conferred upon its company; but in view of the fact that should these companies, respectively, enter into a contest before the legislature for such grant, they might thereby defeat each other, and prevent any disposition of the same, it was deemed advisable by them to enter into an arrangement whereby such conflicting interests should be harmonized, and but one road constructed over the proposed route, with running arrangements for both, as set forth in the statement made. To secure such objects, the written contract of January 10, 1882, was made, and executed as stated; and thereupon, and in pursuance of said contract, the Chippewa and St. Paul Companies ceased all negotiations for the purchase of said stock, and made no application to the legislature for said grant, and rendered to the Omaha Company "all such reasonable and proper assistance as they were able to give in the premises," and "in good faith in all respects observed, performed, and to their utmost ability carried out, the terms and provisions of said contract;" that the Omaha Company was thereby enabled to purchase said stock and obtain said grant from the legislature by virtue of chapter 10, Laws 1882. The contract executed June 10, 1882, was a substantial copy of the one executed January 10, 1882, including dates, except as set forth in the foregoing statement. The validity of chapter 10, Laws 1882, has recently been challenged, on the ground that the grant to the Portage & Superior Company in 1874 gave to that company the right to earn the land therein granted, and was in the

nature of a contract, which the state legislature could not impair, and also upon the ground that the legislature passing the act had been influenced or misled by false representations made to its members respecting the intentions, financial condition, etc., of the Portage & Superior Company. The conclusions reached by Mr. Justice HARLAN, in an elaborate and well fortified opinion, were to the effect that the question of such undue influence and misrepresentation was not one to be determined by courts or juries upon evidence; and that assuming the act to have been unconstitutional and void, as impairing the obligations of contracts, yet that, after the time for constructing the road by the Portage & Superior Company had fully transpired, the legislature had confirmed such revocation and resumption of the grant and the conferring of the same upon the Omaha Company by chapter 29, Laws 1883. *Farmers' L. & T. Co. v. Chicago, P. & S. R. Co.*, 39 Fed. Rep. 143. In this case, however, we must assume, what counsel on both sides have assumed, that chapter 10, Laws 1882, was a valid grant to the Omaha Company. The right of the Portage & Superior Company was, at most, nothing more than to earn the lands granted, upon the terms specified therein. The important question here presented for consideration is whether the agreements contained in the second contract, and here sought to be specifically enforced, are valid.

We are all agreed that the validity of that contract stands upon the same basis as the first, since it was made without any other consideration and is substantially the same as the first, so modified as to include the Chippewa Company as a third party, as it was understood in the negotiations, and at the time of making the original contract, that the St. Paul Company in fact represented the Chippewa Company as well as itself. Especially would this be so if the Omaha Company is forced to rely for its title upon the act of 1883 instead of the act of 1882, as suggested in the case cited. The only considerations for the agreements here sought to be enforced are such as are specified in the fourth subdivision of each of the contracts. The mere option given in the third subdivision cannot be regarded as a consideration, much less a separate and independent consideration. The clause therein to which the arguments have mainly been directed, as found in the second contract, reads as follows: "In consideration of the above agreements, the said parties of the second and third parts hereby agree that they will not make any effort to procure said lands to be granted to them, or either of them, or aid or assist any other party to procure the same, except the party of the first part,

Second contract stands on same basis as first.

and that they will render to said party of the first part all reasonable and proper assistance which they may be able to give in procuring said land grant to be given to the party of the first part by the legislature, and will aid said party of the first part in any negotiations which it may set on foot with the said Chicago, Portage & Superior Railroad Company for the purpose of acquiring the same."

The able and learned counsel for the plaintiff insists that the presumption is always in favor of the legality of contracts, and hence that the "effort," "aid," "assistance," and services thus agreed to be made, rendered, and performed must be regarded as such only as were not illegal, improper, or vicious; and then it is assumed that if such effort, aid, assistance, and services were lawful in themselves, then it was competent for the Chippewa and St. Paul Companies, respectively, to contract with the Omaha Company to make, render, and perform the same. In support of this contention, the same counsel suggests numerous things which the Chippewa and St. Paul Companies, respectively, might innocently have done under the contract. Among these, it is claimed that such company, "or what is the same thing, its managing officers," might legally and properly have refrained from negotiating for the purchase of said stock or the property of the Portage & Superior Company, and advised the parties in charge thereof to negotiate with the Omaha Company; that it was competent for such company or its managing officers to have stated, "either publicly or privately, to its friends, either in or out of the legislature, that its interests would be advanced by granting the Omaha Company's application for said grant;" or have stated "to any of its friends, or any member of the legislature, that, if the grant was made to the Omaha Company, it would have the effect of extending" its "lines or the right to run on the Omaha road to Lake Superior;" or expressed "its opinion and desire and wish that this grant should be made to the Omaha Company."

The fallacy of this contention, if fallacy it be, consists in assuming that, if these several things were not in themselves a violation of law or good morals, then it was competent for the Omaha Company, in consideration thereof, to legally bind itself by the agreement in question to the effect that, in case of its obtaining the land grant, it would give "one equal fourth part" thereof, also the "right, franchises, and property" of the Portage & Superior Company and the "contract of lease" therein mentioned, as therein specified. In an action on a contract not to prosecute a criminal, the most eminent English judge who never reached a higher position than chief

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gality of con-
tract.**

justice of the common pleas, unless by declining to be made lord chancellor, approvingly quotes a text writer, to the effect that a person could not bind himself legally by a "promise to pay money to a man not to do a crime." *Collins v. Blantern*. *Collins v. Blantern*, 2 Wils. 350. A few years later, Lord MANSFIELD, C. J., in behalf of the king's bench, said: "Many contracts which are not against morality are still void, as being against the maxims of sound policy."

A third of a century ago this court, while conceding that an agreement for compensation for certain services in securing the passage of an act, as, for instance, making a public argument before a committee of the legislature, or before the legislature itself, if permitted to do so, might be enforced, nevertheless held that "an agreement to prosecute and superintend, in the capacity of agent and attorney, a private claim before the legislature, is against public policy and void, and no action can be maintained thereon, or for services thus rendered." *Bryan v. Reynolds*, 5 Wis. 200. "To prosecute and superintend my claim for certain services, as contractor to the state, for the construction of the Portage canal," were the words of the written contract. It contained, however, the provision that "such claim to be brought before the legislature in such mode and manner as my said agent and attorney may choose to have the same presented;" and the compensation therein agreed upon was 10 per cent. on the whole amount which the state might allow. In deciding the case, WHITON, C. J., speaking for the whole court, including the present chief justice, said: "We know of no way by which a person who is not a member of the legislature can prosecute or superintend a claim before that body, except by means of the members themselves, or some of them. He could not, therefore, comply with the contract on his part without resorting to personal solicitation with the members of the legislative body. We therefore think that the contract was, by its terms, an agreement to pay money for a consideration which is inconsistent with public policy, and that the agreement is for that reason void." The learned counsel for the plaintiff insists that the case was wrongly decided, and we are asked to reconsider and overrule it, or, at least, distinguish it from the case at bar. It is certainly inconsistent with counsel's theory of the presumptive legality of such contracts. Upon that theory, the "mode and manner" of presentation, prosecution, and superintendence might have been confined to such services as might have been legally contracted for.

It is true, the learned chief justice writing that opinion only cited two adjudications in support of the conclusions reached; but these cases have frequently been sanctioned by other

courts, and he certainly might have cited others which had been previously made, sanctioning the same principles. *Fuller v. Dame*, 18 Pick. (Mass.), 472; *Hatzfield v. Gulden*, 7 Watts (Pa.), 152; *Clippinger v. Hepbaugh*, 5 W. & S. (Pa.), 315; *Filson v. Himes*, 5 Pa. St. 452; *Harris v. Roof*, 10 Barb. (N. Y.), 489; *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.), 314; *Willey v. Collier*, 7 Md. 273; *Rose v. Truax*, 21 Barb. (N. Y.), 361. Besides the case of *Bryan v. Reynolds*, *supra*, has been expressly sanctioned in well considered opinions by at least three courts of high authority. *Powers v. Skinner*, 34 Vt. 274; *Elkhart Co. Lodge v. Crary*, 98 Ind. 238; *Sweeney v. McLeod* (Or.), 15 Pac. Rep. 278. The case of *Bryan v. Reynolds*, *supra*, has also been cited approvingly in *Melchoir v. McCarty*, 31 Wis. 254.

In the leading case of *Fuller v. Dame*, *supra*, the acts to be done, and for which the owner of certain lands was to pay a compensation, were the getting up of a joint-stock company, the purchase of such lands, and the procuring of a terminal depot to be located and constructed thereon by a railroad company. Such cases are undoubtedly regarded as analogous, in principle, to an agreement to pay compensation for procuring legislation. In that case there was no stipulation for secrecy, much less for publicity, and counsel invoked the same presumption of innocence which is here contended for. In considering it, SHAW, C. J., said: "It was strongly pressed by the counsel for the plaintiffs that when a contract is made in general terms, broad enough to include things lawful and unlawful, it shall be presumed that they intended those only which were lawful. * * * The law goes further than merely to annul contracts, where the obvious and avowed purpose is to do or cause the doing of unlawful acts. It avoids contracts and promises made with a view to place one under wrong influences—those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons." He then illustrates how a person might lawfully solicit a bequest or devise in favor of a friend, or lawfully propose a marriage, but that "any promise of reward made to him to induce him to do this, or any promise made afterwards in consideration of such service, would be void. This is founded upon the general consideration of fitness and expediency. Such advice and solicitation, in whatever form the agency may be exerted, are understood to be disinterested, and to flow from a single regard to the interests of the parties. They are lawful only so far as they are free and disinterested. If such advice and solicitation, thus understood to be pure and disinterested, may be justly offered from mercenary motives, they would produce

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all the consequences of absolute misrepresentation and falsehood."

In *Trist v. Child*, 21 Wall. 441, similar illustrations were made, and it was held that "a contract to take charge of a claim before congress, and prosecute it as an agent and attorney for the claimant, * * * is void." *Trist v. Child*. Then, after distinguishing such a contract from one for purely professional services, the court held: "Though compensation can be recovered for these [professional services] when they stand by themselves, yet, when they are blended and confused with those which are forbidden, the whole is a unit and indivisible, and that which is bad destroys the good;" and hence "compensation can be recovered for no part." To the same effect is *Meguire v. Corwine*, 101 U. S. 113.

In *Wildey v. Collier*, *supra*, the agreement for compensation, sought to be enforced, was for procuring favorable action of the governor; but it was held void, as against public policy. The court said: "The reasons are obvious. They are designed to protect the exercise of this power from abuse through the intervention of designing persons, and, although in the particular instance no improper influences may have been resorted to, the public interest in such questions requires that the principle should be enforced in all cases. * * * The same reason applies with equal force in support of claims for obtaining the passage of laws by the legislature." In the case of *Clippinger v. Hepbaugh*, *supra*, it was said by the court: "It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract; that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceive or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal." In *Rose v. Truax*, *supra*, the contract under which compensation was sought was merely "to use his influence, efforts, and labor in procuring the passage of a law by the legislature;" but it was held to be void as against public policy, and, as the contract was entire, it was wholly void, and hence no recovery could be had either upon the contract or *quantum meruit*, even for legitimate services. To the same effect as the above cases are *Mills v. Mills*, 40 N. Y. 543; *Frost v. Inhabitants of Belmont*, 6 Allen (Mass.), 152; *McKee v. Cheney*, 52 How. (N. Y.), Pr.

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Collier.*

*Clippinger v.
Hepbaugh.*

Rose v. Truax.

144; *Gil v. Williams*, 12 La. Ann. 219; *Usher v. McBratney*, 3 Dill. (C. C.), 385; *Tool Co. v. Norris*, 2 Wall. (U. S.), 45; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643, 38 Am. & Eng. R. Cas. 682.

In speaking of the principle applicable to an agreement for compensation for procuring a contract from the government, in *Tool Co. v. Norris*, *supra*, Mr. Justice FIELD tersely observed: "It [such principle] has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements." 2 Wall. 54. On another page he states: "It is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void, as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." 2 Wall. 56. These principles are reasserted by the same learned justice in *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 264.

In the case at bar it is urged that the efforts to be made, the aid and assistance to be given, and the services to be rendered were expressly limited by the contract to such as were "reasonable and proper." In *Marshall v. Railroad Co.*, *supra*, the proposed plan of Marshall, which was the basis of the contract under which he claimed compensation for the services rendered, contained this clause: "I contemplate the use of no improper means or appliances in the attainment of your purpose. My scheme is to surround the legislature with respectable and influential agents, whose persuasive arguments may influence the members to do you a naked act of justice. This is all." He then illustrates by mentioning an ex-state senator and ex-presiding officer of that body. 16 How. 318. So in *Lodge v. Crary*, *supra*, the stipulation was only for the use of "all proper persuasion." So in *Sweeney v. McLeod*, *supra*, the stipulation was merely that the plaintiff would, "by means of all legitimate importunity and submission of evidence, to prevent the passage of any law," etc. But none of these stipulations were sufficient to save either of such contracts from the condemnation of the respective courts. Where the principal object and purpose of an agreement is to secure, by a promise

"Reasonable
and proper"
services.

of compensation contingent upon success, influence upon or with members of a legislature, or executive or other public official, it is none the less vicious in its tendencies because it is therein stipulated that such influence shall be "reasonable and proper." The precise point is that such agreement, for such purchase of influence, is against public policy, and therefore improper.

There is another consideration which has generally made courts more emphatic in condemnation of such contracts, and that is that the agreement for compensation is made contingent upon the success of the legisla-
Lobbying
contracts.tion or other object sought. This is illustrated and held in several of the cases cited. Since it is established that such contingent reward makes such contracts more vicious, it certainly follows that the vice becomes more enormous as the amount of the reward is increased. In the case at bar the share of the land grant contracted for is alleged to be half a million dollars, to say nothing of the lease and other rights contracted for. If such contract for one-fourth of the grant is valid, then upon the same principle, we assume, it would be claimed to be valid if it had been for three-fourths or even nine-tenths of the grant. In bestowing the grant the legislature were executing a trust imposed upon the state by congress. The legislature had no power to pervert that trust, nor any part of it, even for the benefit of the state, much less for the benefit of a railway corporation upon which no part of the grant had ever been conferred, and which owed no duty in the construction or operation of the road in aid of which it was granted. The object of such grant was not only to aid in such construction, but to insure its continued operation. But to sanction such a contract so perverting one-fourth of the grant might, in a supposed case, leave the constructing company insolvent, and without any ability to successfully operate the road. Since the intention of the legislature is only ascertainable from the grant itself, it necessarily follows that they intended to bestow the grant on the Omaha Company alone. To sanction the contract, therefore, would be to defeat the expressed intention of the legislature, and to allow the parties to the contract, in advance of the construction of any portion of the road, to parcel out the grant to suit themselves, when, as a matter of fact and law, the trust could only be executed by the legislature itself in the name of the state, as a naked trustee acquiring all its power to act at all directly from congress. Of course, it was competent for either of these corporations to refrain from applying to the legislature for the grant, but the reasons already given, as well as the authorities here cited, preclude any binding contract for such

compensation for so refraining. It has frequently been held that such a contract is against public policy, and therefore void. *Pingry v. Washburn*, 1 Aik. (Vt.), 264; *Gulick v. Ward*, 10 N. J. Law, 87; *Gibbs v. Smith*, 115 Mass. 592; *Grey v. Hook*, 4 N. Y. 449; *Atcheson v. Mallon*, 43 N. Y. 147. Some of the cases cited in this opinion lay stress on the fact that the claimant for compensation was or was not a member of the legal profession. A lawyer, engaged in the business of drawing petitions and bills, collecting and presenting evidence and facts by argument or otherwise, before committees or the legislature itself may undoubtedly contract for compensation for such services. In such cases the attorney openly appears to all as the representative of the interested party, and no one is likely to be deceived as to his motives or representative character. But a non-professional, incapable of rendering such services, stands in a different attitude. If such a person engages to procure or aid in the procuring of the passage of a bill, he necessarily contracts for lobby services. "A person who frequents the lobby of a house of legislation, for the purpose of influencing measures" therein pending is a "lobby member." *Webst. Dict.* To "lobby" is for a person, not belonging to the legislature, "to address or solicit members of a legislative body, in the lobby or elsewhere, away from the house, with a view to influence their votes." *Id.*

Of course, the Chippewa Company, and especially the St. Paul Company, as common carriers, have been of immense service in developing the resources and increasing the value of property in our state. As such common carriers, they were necessarily interested in the creation and successful operation of a new railway like the one in question. They, and their respective officers and employes, as citizens of the state, had the same interest in the enterprise that citizens in general had, and probably more than part of them. Still we are to remember that, at the time of making the first contract, neither of those companies, nor the Omaha Company, had any legal right, title, or interest in or to the portion of the land grant in question, and were as strangers to the then proposed legislation. True, either or any other railway company was at liberty to apply for the grant, but the legislature, in its wisdom, was perfectly free to refuse or grant such application. The grant was to the Omaha Company alone. Neither of the other companies is in any way connected with it, unless it be by virtue of the contract in question. If, then, they are entitled to any portion of that grant, it is by reason of the agreement therein to make the efforts, give the aid and assistance, and render the services stipulated in procuring said land grant to be given to the Omaha Company. But

what efforts could they make, what aid or assistance could they give, what services could they render, except such as are justly characterized as "lobbying?" If one railway company may thus legally contract with another railway company for contingent compensation in consideration of such efforts, aid, assistance and services, then it may make similar contracts with private individuals, or municipal or other corporations, asking legislative action. If corporations could so legally contract, then it would be competent for individuals to do the same. We are not stating what is likely to occur, but what would be the probable tendency of sanctioning the validity of such a contract. Besides, the powers of every corporation are limited to such as are expressed in its charter or named in the statutes, and such implied powers as are necessary or convenient to carry into execution those which are thus expressed. It is enough to know that these do not include the making of lobbying contracts for contingent compensation for procuring legislation respecting matters in which such corporation has no more concern than the people generally. In the matter of disposing of land grants, as in all other matters of legislation, it is important, to the continued welfare of the state and all its citizens, that all improper avenues of approach should be effectually closed. In two of the cases cited, Mr. Justice FIELD, speaking of the duties of members of legislative bodies and public officers, asserts what ought to go without saying, that "all such positions are trusts, to be exercised from considerations of duty and for the public good. Whenever other considerations are allowed to intervene and control their exercise, the trust is perverted and the community suffers." He then declares, in effect, that personal influence in such matters is "not the subject of bargain and sale," that it "is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article." 103 U. S. 273, 274; 2 Wall. 56. These maxims of legislative and official propriety and duty, it is believed, are as old as our government, and it may be safely assumed that they will never be brought into disrepute by the American courts. To properly aid in wielding the sovereign power of a great people, under the sanction of an oath, presupposes freedom from any and all extraneous bias and purchased influence. They imply continued vigilance for the public weal and the faithful performance of every public duty. In the execution of such official trusts, no favors can be secured and no obligations incurred.

For the reasons given we must hold the contract void.

The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

NOTE BY CASSODAÏ, J.—Since filing the foregoing opinion, § 4482, Rev. St., which seems to have escaped the vigilance of the learned counsel on both sides, as well as the several members of the court, has come to our notice. It provides, in effect, that any person who shall, directly or indirectly, give or receive, or agree to give or receive, or offer to give, “any money or property, or valuable thing, or any security therefor, to any person,” for his services, or the services of another, “in procuring the passage or defeat of any measure before the legislature, or before either house or any committee thereof, upon the contingency or condition of the passage or defeat of such measure,” or who, having any interest as principal, agent, attorney, or otherwise, “in procuring or attempting to procure the passage or defeat” of such measure, “shall attempt in any manner to influence any member of such legislature for or against such measure, without first making known to such member the real and true interest he has in such measure, either personally, or as such agent or attorney, shall be punished” as therein prescribed. This section was, manifestly, for the more effectual suppression of such acts and agreements, coming, as they do, under the condemnation of the common law, as indicated in the foregoing opinion. It is true, this section does not expressly name corporations, but only, “any person.” These words, however, must be construed as extending to and including any corporation. Subdivision 12, § 4971, and subdivision 2, § 4972, Rev. St. If it be claimed that the section does not include corporations, and that they are to enjoy the exclusive privilege of giving or receiving, or agreeing to give or receive, or offering to give, money or property for such lobbying services, then such privilege should be limited to such corporations as may be chartered specifically for that purpose; for in that event they would, in the spirit of the latter clause of the section cited, appear in their true character, and thus enable unwary members of the legislature, as well as the public, the better to guard against their approach, or to escape their allurements altogether. Since the making of the agreement in question was punishable under the statute cited, it is, of course, idle to contend that it may be specifically enforced in equity notwithstanding.

Lobbying Contracts—Invalidity as Against Public Policy.—See 9 Am. & Eng. Encyc. of Law 898.

HASTINGS & DAKOTA R. Co.

v.

WHITNEY *et al.*

(*United States Supreme Court, December 9, 1889.*)

Land Grant—Effect of Entry Under Land Laws.—Land upon which an entry of record, valid upon its face, has been made, is appropriated and withdrawn from subsequent homestead entry, preemption settlement, sale or grant until the original entry be cancelled, or be declared forfeited, and

in the event of cancellation or forfeiture, the land reverts to the government as part of the public domain and becomes again subject to entry under the land laws.

Same—Exception—When Right of Homestead Settlement Attaches.—A person engaged in actual service in the United States made affidavit pursuant to section 2293, U. S. Rev. St., stating that he was the head of a family, a citizen of the United States, and a resident of Franklin Co., N. Y. The affidavit did not state that the affiant's family, or any member thereof, was residing on the land, or that there was any improvement thereon, and as matter of fact, no member of his family was then residing or ever had resided on the land, and no improvement had been made upon it. The applicant paid the fees and the entry was allowed by the register, and received in the local land office and recorded. *Held*, that the entry having been made and recorded, the defects were not sufficient to render it absolutely void, and that a "right of homestead settlement" had attached within the meaning of the exception in an act granting lands in aid of a railroad.

Same—Homestead Entry—Person Serving in Army.—Where the applicant for a homestead settlement was in actual service in the army at the time of the application, a defect in his right to homestead settlement arising from the fact that his family or any member thereof, had not resided upon the land, is cured by section 2308, U. S. Rev. St., which declares that where a party at the date of his entry under the homestead law is actually serving in the army, his service therein shall, in the administration of the homestead laws, be construed to be equivalent to residence for the same length of time upon the lands entered.

ERROR to the Supreme Court of the state of Minnesota.
Gordon E. Cole for plaintiff in error.

LAMAR, J.—This is an action, somewhat in the nature of a suit in equity, originally brought in the district court of Ramsey county, Minn., by the Hastings and Dakota Railroad Company, (a corporation organized under Facts. the laws of that state) against Julia D. and John Whitney, to recover a tract of about 80 acres of land situated in that county, for which the defendants have a United States patent. The material facts in the case are undisputed, and are substantially as follows: By the act of July 4, 1866, congress granted to the state of Minnesota, for the purpose of aiding in the construction of a railroad from Hastings, through the counties of Dakota, Scott, Carver, and McLeod, to such point on the western boundary of the state as the legislature of the state might determine, every alternate section of land, designated by odd numbers, to the amount of five alternate sections per mile on each side of the road. The act further provided that "in case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States

for any purpose whatever, then it shall be the duty of the secretary of the interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the secretary of the interior, shall be held by said state of Minnesota for the purposes and uses aforesaid." 14 St. 87. On the 7th of March, 1867, the legislature of Minnesota accepted this grant, and transferred it over to the plaintiff. The railroad company complied with all the terms and conditions of the acts of congress, and of the legislature of the state of Minnesota, and on or about the 7th of March, 1867, definitely located its line of road by filing its map in the office of the commissioner of the general land-office. The land which is the subject of this controversy fell within what are known as the 10-mile limits of the aforesaid grant, when the line of road was definitely located. The case being brought on for trial on evidence produced by the respective parties, the court made and filed its findings of fact and conclusions of law, the essential parts of which are as follows: "Claiming to act under the provisions of section 2293 of the Revised Statutes of the United States, one Bentley S. Turner, on the 8th of May, 1865, then being a soldier in the army of the United States, and actually with his regiment in the state of Virginia, made an affidavit, and caused the same to be filed in the local land-office of the district wherein said land was situate. Said affidavit was made before his commanding officer in the state of Virginia, and stated that said Turner was the head of a family, a citizen of the United States, and a resident of Franklin county, N. Y. Application was made through one Conwell, whom said Turner constituted his attorney for that purpose, upon said affidavit, to enter said land as a homestead. Said affidavit did not state that Turner's family, or any member thereof, was residing on the land, or that there was any improvement, thereon; and, as a matter of fact, no member of his family was then residing, or ever did reside, on said land, and no improvement whatever had ever been made thereon by any one. Thereupon, upon being paid their fees by said Conwell, the register and receiver of said land-office allowed said entry, and the same stood upon the records of said local land-office and upon the records of the general land-office uncanceled until September 30, 1872, when said entry was cancelled by the proper officers of the

United States. It does not appear that any specific reason was assigned for said cancellation, nor does the reason for said cancellation appear, save as it may be furnished by the facts aforesaid. On the 7th day of May, 1877, without notice to the plaintiff, the defendant Julia D. Whitney, then a single woman, by name Julia D. Graham, who has since intermarried with said defendant John Whitney, did enter said land at the local land-office as a homestead, and thereafter, in the usual course of business, the officers in charge of the general land-office of the United States caused a patent of the United States for said land to be issued in due form, and delivered to said defendant Julia, who ever since May 7, 1877, has been and now is in the actual occupancy of said premises, holding the same under said patent. Said land is of the value of six hundred, (\$600)." After making these findings of fact, and holding as a conclusion of law that the alleged entry of Turner was absolutely void, that the title to the land in dispute was, under the land grant to the state, vested in the plaintiff, and that the entry of Julia D. Whitney thereon was unauthorized and of no effect, the court entered a decree in favor of the plaintiff in error. On an appeal by the defendant to the supreme court of the state that decree was reversed, without any order for a new trial. Such reversal, under the laws of Minnesota, is, in effect, the final judgment of the highest court of that state in which a decision of the cause could be had, and the case has been brought here by a writ of error.

Section 1 of the act of March 21, 1864, (13 St. 35), now section 2293 of the Revised Statutes, under which Turner's homestead entry was made, provides as follows: "In case of any person desirous of availing himself of the benefits of this chapter, but who, by reason of actual service in the military or naval service of the United States, is unable to do the personal preliminary acts of the district land-office which the preceding sections require, and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a *bona fide* improvement and settlement have been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and, upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law." The question presented for our consideration is whether, upon the facts found and admitted, the homestead entry of Turner upon the land in

controversy excepted it from the operation of the land grant under which plaintiff in error claims title.

The doctrine first announced in *Wilcox v. Jackson*, 13 Pet. 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or to operate upon it, although no exception be made of it, has been reaffirmed and applied by this court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country. In *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210, this court decided, in accordance with the decision in *Carroll v. Safford*, 3 How. (U. S.) 441, that "lands originally public cease to be public after they have been entered at the land-office, and a certificate of entry has been obtained;" and the court further held that this applies as well to homestead and pre-emption as to cash entries. In either case, the entry being made, and the certificate being executed and delivered, the particular land entered thereby becomes segregated from the mass of public lands, and takes the character of private property. The fact that such an entry may not be confirmed by the land-office on account of any alleged defect therein, or may be cancelled or declared forfeited on account of non-compliance with the law, or even declared void, after a patent has issued, on account of fraud, in a direct proceeding for that purpose in the courts, is an incident inherent in all entries of the public lands.

In the light of these decisions, the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption settlement, sale, or grant until the original entry be cancelled or declared forfeited; in which case the land reverts to the government as a part of the public domain, and becomes again subject to entry under the land laws. The correctness of this holding has been sustained by this court in the case of *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, and the principle applied to a railroad grant act, which contained the same exceptions as those embodied in the act under which the plaintiff in error claims title to the tract in controversy. In that case a homestead claim had been made and filed in the land-office by one Miller, and there recognized by a certificate of entry, before the line of the company's road was located. Subsequently to the location he abandoned his entry, and took a title under the railroad company, and his homestead

Effect of appropriation of public lands.

Cancellation of entry—Effect.

entry was cancelled. One G. B. Dunmeyer then entered the land under the homestead law, claiming that, by the cancellation for abandonment, it had passed back into the mass of public lands, and was not brought within the grant; and upon that claim ousted the defendant in error, who afterwards brought his action against the railroad company for a breach of covenant, obtaining a judgment in the court below, which was afterwards affirmed by this court. The court said, Mr. Justice MILLER delivering its opinion: "The record shows that on July 25, 1866, Miller made a homestead entry on this land which was in every respect valid. * * * It also shows that the line of definite location of the company's road was first filed * * * September 21, 1866. * * * In the language of the act of congress, this homestead claim had attached to the land, and it therefore did not pass by the grant. Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land-office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do." "It is argued by the company that, although Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the line of definite location was filed by it, yet when Miller abandoned his claim, so that it no longer existed, the exception no longer operated, and the land reverted to the company; that the grant by its inherent force reasserted itself, and extended to or covered the land as though it had never been within the exception. We are unable to perceive the force of this proposition. * * * No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations for forts and other purposes, which have been given up or abandoned as such reservations, and were of great value. Nor is it understood that, in any case where lands had been otherwise disposed of, their reversion to the government brought them within the grant. Why should a different construction apply to lands to which a homestead or pre-emption right had attached? Did congress intend to say that the right of the company also attaches, and whichever proved to be the better right obtained the land?"

Counsel for plaintiff in error contends that the case just cited has no application to the one we are now considering, the difference being that in that case the entry existing at the time of the location of the road was an entry valid in all respects, while the entry in this case was invalid on its face, and in its inception; and that this entry, having been made by an agent of the applicant, and based upon an affidavit which failed to show the settlement and improvement required by law, was, on its face, not such a proceeding, in the proper land office, as could attach even an inchoate right to the land. We do not think this contention can be maintained. Under the homestead law three things are needed to be done in order to constitute an entry on public lands: *First*, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; *second*, he must make a formal application; and, *third*, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered. If either one of these integral parts of an entry is defective—that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash—the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards canceled on account of these defects by the commissioner, or on appeal by the secretary of the interior; or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the department, and, on failure to do so, the entry may then be canceled. But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. In the case before us, at the time of the location of the company's road an examination of the tract-books and the plat filed in the office of the register and receiver, or in the land office, would have disclosed Turner's entry as an entry of record, accepted by the proper officers in the proper office, together with the application and necessary money—an entry the imperfections and defects of which could have been cured by a supplemental affidavit or by other

Application
for lands not
invalid upon
its face.

proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of the entryman to comply with all the provisions of the law under which he made his claim. A practice of allowing such contests would be fraught with the gravest dangers to actual settlers, and would be subversive of the principles upon which the munificent railroad grants are based. As was said in the *Dunmeyer* case, *supra*: "It is not conceivable that congress intended to place these parties [homestead and pre-emption claimants on the one hand, and the railway company on the other] as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations."

A question somewhat analogous, in principle, to the one in this case, arose in *Newhall v. Sanger*, 92 U. S. 761. In that case, *Newhall* claimed under a patent issued to the Western Pacific Railroad Company, for land supposed to be within the grant made by the act of July 1, 1862, (12 St. 489,) and that of July 2, 1864, (13 St. 356,) and *Sanger* claimed under a subsequent patent which recited, among other things, that the former patent had been erroneously issued. The land in controversy had been within the boundaries of a claim made under a Mexican grant, which was pending in the land department of the United States at the time the order withdrawing the railroad lands from entry was made. The Mexican claim was rejected a few days thereafter because of its fraudulent character. Under that state of facts, the contention of the railroad company was that, the Mexican claim having been declared invalid, the land in controversy became subject to the operation of the granting acts, and therefore passed to the company. But this court declared otherwise, and held that the land never became subject to the grant, and that the claimant under the second patent had the better title.

In addition to this, § 2308 of the Revised Statutes provides: "Where a party at the date of his entry of a tract of land under the homestead laws, or subsequently thereto, was actually enlisted and employed in the army or navy of the United States, his services therein shall, in the administration of such homestead laws, be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered," etc. That act is a curative act, or, rather,

Service in
army as equiv-
alent to resi-
dence.

one putting a construction upon the prior act of 1864, under which the Turner entry was made. The effect of it is to declare service in the army or navy of the United States by the applicant, at the date of an entry made under the act of 1864, equivalent to actual residence upon the land by him. In that view of the case the affidavit in the Turner entry was sufficient; for in contemplation of law, he was then residing upon the tract embraced in his entry.

The conclusion at which we have arrived is in harmony with the latter rulings of the land department. See *Graham v. Railroad Co.*, (this case,) 1 Dec. Dep. Int. 382; *Railway Co. v. Forseth*, 3 Dec. Dep. Int. 446; *Extension Co. v. Gallipean*, *Id.* 166; *Railway Co. v. U. S.*, *Id.* 479; *Railway Co. v. Leech*, *Id.* 506; *Railway Co. v. Whitnall*, 4 Dec. Dep. Int. 249; and many others of like tenor and effect. It is true that the decisions of the land department on matters of law are not binding upon this court, in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In *U. S. v. Moore*, 95 U. S. 760, 763, this court said: "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draughtsmen of the laws they are afterwards called upon to interpret." See, also, *Brown v. United States*, 113 U. S. 568, 571, and cases there cited; *U. S. v. Burlington & M. R. R. Co.*, 98 U. S. 334, 341; *Kansas, Pac. R. Co. v. Atchison, T. & S. F. Co.*, 112 U. S. 414, 418, 26 Am. & Eng. R. Cas. 506. Other subsidiary questions have been argued by counsel for plaintiff in error, but they are all virtually disposed of in the foregoing.

For the foregoing reasons we concur with the court below that Turner's homestead entry excepted the land from the operation of the railroad grant; and that upon the cancellation of that entry the tract in question did not inure to the benefit of the company, but reverted to the government, and became a part of the public domain, subject to appropriation by the first legal applicant, who, as the record shows, was the defendant in error, Julia D. Whitney, *nee* Graham. The decree of the supreme court of Minnesota is affirmed.

YOUNG *et al.*

v.

GOSS.

(Kansas Supreme Court, November 9, 1889.)

Land Grant—Exceptions—Abandoned Homestead Entry—A homestead entry, made before the definite location of the railroad, but which had been voluntarily abandoned before such definite location, although the filing thereof was not canceled until after the location, did not operate to except the land from the grant to the railroad company, under the provisions of the act of congress of March 3, 1863, donating to the state of Kansas lands to aid in the construction of certain railroads and telegraphs.

ERROR from District Court, Chase County.

This action was tried at the June term, 1887, of the Chase district court. The following statement of facts was agreed to by N. S. Goss, as plaintiff, and Martha E. Young, S. P. Young, and Phebe M. Boynton, as defendants. *First.* This is an action by N. S. Goss to foreclose a mortgage made to him by John Emslie and Jane Emslie his wife, on the S. W. $\frac{1}{4}$ of section 33, township 19, range 8 E., in Chase county, Kan. That neither of these defendants were parties to the making of said mortgage, nor had any knowledge of its being made until long after it was recorded in the office of the register of deeds of Chase county, Kan. *Second.* John Emslie claims ownership and title to the S. W. $\frac{1}{4}$ of section 33, township 19, range 8 E., through the act of congress granting lands to the state of Kansas to aid in the construction of the Atchison, Topeka & Santa Fe Railroad, and for other purposes, approved March 3, 1863. *Third.* Martha E. Young claims ownership of, and title to, the N. $\frac{1}{2}$ and Phebe M. Boynton claims ownership of, and title to, the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ section 33, township 19, range 8 E., through the homestead entry thereof by Andrew J. Stainbrook, made under the act of congress to secure homesteads to actual settlers on the public domain, approved May 20, 1862, and amendments thereto. *Fourth.* October 1, 1863, in full compliance with law, John W. Randall made his homestead entry No. 396, on S. W. $\frac{1}{4}$ of section 33, township 19, range 8 E., in Chase

county, Kan., and complied with all the requirements of the homestead laws of congress until August 7, 1868, when he abandoned the land, and, under the complaint filed by Andrew J. Stainbrook, a hearing was had at the local land-office at Salina, Kan., August 7, 1871, when it was shown that Randall had abandoned said tract of land three years previously, and the said homestead entry of said John W. Randall on said tract of land was canceled October 12, 1871, for failure to complete the same. *Fifth.* November 21, 1871, under the rulings and decisions of the officers of the United States land department, Andrew J. Stainbrook made his homestead entry No. 11,913, on said S. W. $\frac{1}{4}$ of section 33, township 19, range 8 E. *Sixth.* September 24, 1873, on the application of the Atchison, Topeka & Santa Fe Railroad Company, made by N. S. Goss, its then attorney, and now plaintiff in above entitled action, by an *ex parte* proceeding, without notice to Andrew J. Stainbrook, and without any knowledge on his part that said proceedings had been instituted, or were being had, the commissioner of the general land-office declared Andrew J. Stainbrook's said homestead entry on said tract of land canceled, for pretended conflict with the grant of lands to the state of Kansas to aid the construction of said railroad, and for other purposes, approved March 3, 1863. *Seventh.* May 28, 1874, said S. W. $\frac{1}{4}$ of section 33, township 19, range 8 E., was certified to the state of Kansas for the benefit of the Atchison, Topeka & Santa Fe Railroad, under the act of congress approved March 3, 1863, and subject to all its conditions, and to any valid interfering rights that may exist. *Eighth.* February 8, 1875, the state of Kansas issued its patent for said tract of land to the Atchison, Topeka, & Santa Fe Railroad Company, with the same conditions, viz., under the act of congress approved March 3, 1863, and subject to all the conditions, and to any valid interfering rights, that may exist. *Ninth.* May 20, 1874, the Atchison, Topeka & Santa Fe Railroad Company made its warranty deed to said tract of land to N. S. Goss, its then attorney, now plaintiff in this action, for the consideration of \$1. *Tenth.* February 3, 1877, N. S. Goss made his warranty deed for said land to John Emslie, and February 6, 1877, John Emslie and Jane Emslie, his wife, made their mortgage on said land to N. S. Goss to secure the payment of the notes sued on in this action given by Emslie to Goss for the purchase money of said tract of land by Emslie from Goss. *Eleventh.* October 14, 1878, the honorable secretary of the interior, by his decision of that date, under the application of Andrew J. Stainbrook, duly made and prosecuted, after due notice to said Atchison, Topeka & Santa Fe Railroad Com-

pany, and under the act of congress approved April 21, 1876, reinstated said Stainbrook's said homestead entry on said tract of land; and Stainbrook having filed his final proof in compliance with the requirements of the homestead laws of congress on his part, a patent was in due form issued to him for said tract of land, of date April 22, 1879. *Twelfth.* May 2, 1879, for a valuable consideration, Andrew J. Stainbrook and Lucy A. Stainbrook, his wife, duly made their warranty deed for the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 33, township 19, range 8 E., to Martha E. Young. *Thirteenth.* August 18, 1879, Andrew J. Stainbrook and Lucy A. Stainbrook, his wife, for a valuable consideration made their warranty deed for the S. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 33, township 19, range 8 E., to this defendant, Phebe M. Boynton. *Fourteenth.* The S. W. $\frac{1}{4}$ of section 33, township 19, range 8 E., is within the 10 mile limit of the line or route of the Atchison, Topeka & Santa Fe Railroad, and the line or route of said railroad was definitely located through Chase county, Kan., and opposite said tract of land, June 30, 1869, and notice of withdrawal from the market of all lands within the 10 mile limits to which the company's right had attached, at definite location of line or route of road, was received at the local land-office, November 3, 1869. The court found generally for the plaintiff, and rendered judgment for him, adjudging the mortgage of plaintiff to be a first lien upon the land in question. The defendants, complaining of that judgment, bring the case here for review.

O. A. Bassett and Douthitt, Jones & Mason for plaintiffs in error.

Geo. R. Peck, C. N. Sherry, and A. A. Hurd for defendant in error.

HOLT, C.—The title of this tract of land has been litigated before. Martha E. Young brought her action to quiet her title to a part thereof in the Chase district court. At the first day of the May, 1880, term, a judgment was rendered in her favor on default. This judgment was afterwards reversed in this court (*Emslie v. Young*, 24 Kan. 732) for the reason that the petition did not state a cause of action. The allegations of the petition were substantially the same as the facts agreed upon in this action, so far as they relate to the title of Martha E. Young to the land in dispute. Usually the rule laid down in that case would be the one we should be guided by in our investigation and determination of the issues in this action. Chief Justice HORTON, delivering the opinion in that case, said: "It is urged, however, that the claim of Randall, although aban-

*Emslie v.
Young.*

done before the location of the road, yet, because it was then uncanceled, had sufficient force and validity to take the land from the railroad company,—in brief, that a forfeited and abandoned homestead claim, simply uncanceled upon the books of the land-office, has the like effect to exclude land from the railroad grant as a subsisting valid homestead claim, capable of being perfected, and ripening into an absolute title. Such an interpretation of the act of 1863 is not sustained by the letter or spirit of the statute. The act does not speak of entries or filings as excepting lands from the operation of the grant, but of rights,—the right of pre-emption and homestead. The spirit of the act was to protect pre-emption and homestead settlers, having valid and subsisting rights at the time the grant became certain. It was not the intention of congress, by the exceptions in the act, to exclude lands from the grant upon fraudulent or forfeited entries or filings. In our opinion, the land having been abandoned as a homestead claim when the route of the road was fixed, no right of homestead settlement attached to the land, within the meaning of the act, at the date of the location of the road; and that at such location the grant attached to the land, notwithstanding the non-cancellation or the homestead filing of Randall. This conclusion leads us to decide that the land in controversy belonged to the railroad company on May 20, 1874, when the deed was executed to N. S. Goss, and that the defendant John Emslie is the owner of the land, subject to the mortgage lien of his grantor."

The defendants contend, however, that the supreme court of the United States, in the case of *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, have laid down a rule of law different from that enunciated by this court in *Emslie v. Young*.

**Kansas Pac.
R. Co. v. Dun-
meyer.**

The language used in *Kansas Pac. R. Co. v. Dunmeyer* might be construed to sustain the contention of the defendants, but the facts in that case are unlike the facts in this. It appears from the record in that case that one Miller made a home entry on a quarter section of land in Saline county on the 26th day of July, 1866. On the 11th of the same month the Union Pacific Railway Company, Kansas division, which is the branch now called the "Kansas Pacific Railway Company," filed its map showing the general line of its road, and the land was withdrawn from preemption, private entry, and sale on the 26th of July, the next day after the plaintiff had made his home entry. The company claimed title to the land under two acts of congress granting the land to the Union Pacific Railway Company and branches,—namely, the act of 1862, and amendatory act of July 2, 1864, and the act of July 3, 1866. Their

land was situated within the limits of the land so granted. In 1871 Miller's homestead entry was canceled. The court held that the land in dispute was not a part of the grant to the railroad company, for the reason that Miller's homestead right had attached thereto before it was withdrawn from pre-emption, private entry, and sale. There is this distinction between the facts in that case and this: Miller's homestead entry at the time the railroad acquired its home entry in the land was a valid and existing right, which might have ripened into a title. In this case the home entry of Randall had been abandoned nearly a year before the line of the road had been located, and a year before the land was withdrawn from sale. Now we believe if the entry of Randall had been cancelled before the 30th of June, when the railroad company acquired its interest in the land, that this quarter section would have reverted to the government, and thereby been within the purview of the grant to the company. The rule would not have been different, we think, when the land had been actually abandoned, though the entry of Randall had not been declared canceled at the local land-office. From the agreed statement of facts in this case, Randall had no existing rights under his own entry on the 30th day of June, 1869, and therefore this land was embraced in the grant of the government to the railroad company. We recommend that the judgment be affirmed.

PER CURIAM.—It is so ordered; all the justices concurring.

Land Grants—Rights Under Homestead Entries.—See *Kansas City, L. & S. K. R. Co. v. Attorney-General* (U. S.), 29 Am. & Eng. R. Cas. 467, note, 475; note, 38 *Id.* 675, 676; *Hastings & D. R. Co. v. Whitney* (U. S.), *ante*, p. 428.

FRANCOEUR

v.

NEWHOUSE.

(*U. S. Circuit Court, N. D. California, December 9, 1889.*)

Central Pacific Railroad Land Grant—Grant in Presenti.—The grant of lands to the Central Pacific Railroad Company to aid in the construction of its road, under the act of congress of July 1, 1862, and the amendatory act of 1864, is a grant *in presenti*, which can only be defeated by the failure to perform the conditions subsequent, and appropriate judicial proceeding to declare a forfeiture.

Same—Ejectment Before Patent Issued.—The title which vests under the congressional grant, and the performance of the prescribed conditions, is a legal title, upon which an action of ejectment may be maintained before the patent issues.

Same—Patent—Evidence of Performance of Conditions.—The patent issued under the congressional grant is only a convenient instrument of evidence that the conditions have been performed and the title vested.

Same—Expense of Survey—Non-payment.—The failure to pay the expense of surveying, under section 21 of the act of 1864, only prevents the issue of the patent. It does not prevent the title attaching under the congressional grant.

Same—Exception of Mineral Lands—Discovery of Metals.—The exception of mineral lands from the grant to the Central Pacific Railroad Company, only extends to lands known to be mineral, or, apparently mineral, at the time when the grant attached; and a discovery of a gold mine in the lands after the title has vested by full performance of the conditions, does not defeat the title.

Same—Patent—Insertion of Unauthorized Exception.—An exception inserted in a patent, which is not authorized by the statute to be inserted, is void.

Same—Collateral Attack upon Patent for Lands Granted.—Where a patent is issued for land which has been before granted to other parties, and there is no interest left in the government to grant, the interior department acts without jurisdiction, there being nothing in the United States to grant, and the patent so issued is void, and may be collaterally impeached.

Same—Trespassers—Prospecting for Mines.—Where land has been granted to private parties, other parties have no right afterwards to enter upon the land and prospect for gold. No right can be initiated by a trespass upon private lands.

AT LAW.

This is an action to recover possession of lot 52 of section 13, township 17 N. of range 11 E. Mt. Diablo meridian. The plaintiff claims title by conveyance from the Central Pacific Railroad Company. It is alleged in the complaint that the land is part of an odd-numbered section lying within the 10-mile limit of the grant made to the Central Pacific Railroad Company, to aid in the construction of a railroad, by the act of congress passed July 1, 1862, (12 St. 489); that the said corporation filed its assent to said act, and a map designating the general route of said railroad, with the secretary of the interior within two months after the passage of the act; that on August 2, 1862, the secretary of the interior caused all the lands within 15 miles of said route, including the land in question, to be withdrawn from pre-emption, private entry, and sale; that the line of said road was definitely fixed, said road fully constructed and accepted by the president, from the western terminus, to a point more than 25 miles east of the township in which said land is situated, prior to September 29, 1866; and the whole of said road was definitely located, constructed, accepted by the president, and in operation to the east line of the state prior to July 2, 1868;

that in the year 1866 the secretary of the interior caused all the lands in said township 17 north to be surveyed, and on March 2, 1867, the United States surveyor general made return of the official plat of said survey, and filed the same in the general land-office at Washington, on June 2, 1867, and the same was soon after regularly filed in the local land-office at Marysville, that being the district in which said land was situated; "that by said survey the description of all lands in said township was ascertained, and the character thereof determined to be agricultural lands, and not mineral or swamp in character, nor covered by any governmental reservation; that the plats filed as aforesaid, so reported and showed the said lands; and that said determination, report, and showing have continually remained, and still remain, of full force and effect;" that said section 13, township 17, is within the limits of five miles of said railroad, along the line thereof, and, with other lands, was granted to said Central Pacific Railroad Company of California by said act of Congress; that at the date of the passage of said act of congress, at the date when said line of said railroad was definitely fixed, and at the date when the said railroad was actually constructed through and beyond said township, all of said section 13 was returned as agricultural land, and no part of the same was known mineral land, or returned or denominated as mineral land, nor had any part of the same been sold, reserved, or otherwise disposed of by the United States, nor had any pre-emption or homestead claim attached to the same; nor was any part of said land within any exception from said grant; nor did the granting thereof to said company defeat or impair any pre-emption, homestead, or swamp, or other lawful claim to the same, or to any part thereof.

That during the year 1883 a vein or lode of quartz-bearing gold, in paying quantities was discovered within lot 53 of section 13, the premises in question; that on April 20, 1885, the Eagle Gold Mining Company filed in the proper office its application for a patent to said lot 53, from the United States, under the mining laws passed by congress; that on May 5, 1887, pursuant to said application, the land department issued to said Eagle Gold Mining Company a patent to said lot 53, as the Eagle Bird Quartz Mine. That said application was made and patent issued without authority of law, and said patent is void, and, that said defendant is in possession, claiming under said patent through mesne conveyances from said patentee.

That the Central Pacific Railroad Company has tendered to the treasury the amount of money required by the statute, and demanded a patent, but it has been refused, although all

acts required by the law to entitle it to a patent have been fully performed, and the title to said premises has vested in it.

A. L. Hart and Geo. H. Francocur for plaintiff.

Reinstein & Eisner and James M. Sewell for defendants.

SAWYER, J.—It has been so often decided that the grant to the railroad company under this, and similar acts, is a grant *in præsentî*, passing and vesting a present title, only to be defeated by a failure to perform the conditions subsequent, and suitable judicial proceedings on the part of the United States, to forfeit them, that it is only necessary to cite the authorities without further discussing the question. *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 496; *Schulenberg v. Harriman* 21 Wall. (U. S.) 44; *Van Wyck v. Knevals*, 106 U. S. 360. “‘There be and is hereby granted’ are words of absolute donation, and import a grant *in præsentî*. This court has held that they can have no other meaning.” *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 741, *Wright v. Roseberry*, 121 U. S. 500; *Railroad Co. v. Orton*, and cases cited, 6 Sawy. (U. S.), 198; Mr. Justice FIELD went over the subject fully in *Denny v. Dodson*, 32 Fed. Rep. 899, in which he held that not merely the equitable title, but the legal title to the land passed by the legislative grant *in præsentî*, in such sense that an action of ejectment could be maintained upon it—that the patent provided for, was not necessary to pass the title, but was only a convenient instrument of evidence, citing a passage from the opinion of the supreme court, in *Langdeau v. Hanes*, 21 Wall. (U. S.), 521, as follows: “In the legislation of congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey, but, where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim, as justify its recognition, and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government.” *Denny v. Dodson*, 32 Fed. Rep. 904.

The provision of section 21 of the act of 1864 requiring the railroad company to pay the expenses of surveys and conveyance, does not affect the question of the vesting of the title under the legislative grant. It only applies to the issue of a convenient instrument of evidence. But in this case the title had already vested and passed beyond the authority of congress, before

Vesting of
title—Ex-
pense of sur-
veys.

the passage of the act of 1864, which could only amend the prior act so far as to effect its future operation as a law.

A title, therefore, vested by the grant, and performance of the conditions, upon which an action of ejectment can be maintained.

The next question is, did the land in question pass, by the grant of 1862 perfected in 1866-67, in which a gold mine was discovered in 1883, 21 years after the grant attached by the filing of a plat of the general route of the railroad, and the withdrawal of the lands in pursuance of the statute, by the secretary of the interior, and more than 17 years after the completion of the road, and its acceptance by the president, and more than 16 years after the final survey, and report of the lands, as agricultural, and not mineral? The parties to this grant, both the United States, and the grantee, must be presumed to have contemplated a grant in view of the condition of the lands as they were known, or appeared to be, at the time the grant took effect. In the exception of "mineral lands" from the grant, congress must have meant not only lands mineral, in fact, but, lands known to be mineral, or, at most, such as were, apparently, mineral, and, generally, recognized as such. Congress could not have contemplated that the discovery of a paying mine, 15 or 20 years after the making of the grant, and the performance of all the conditions by the grantee, required to perfect the title, and render it irrevocable, should vitiate the grant. If so, then such a discovery 50, or 100 years after, would effect the same result. In granting the public lands, congress must be presumed to deal with them in view of the conditions as they are known, or supposed to be, at the time. Exceptions must be presumed to refer to matters that are readily apparent upon inspection. Any others would be altogether too indefinite to be valid. The conditions constituting the exception ought, certainly, to be ascertainable at the time the grant takes effect, or they ought not to be operative; otherwise the greatest confusion and inconvenience, public and private, must, necessarily, result.

The grant should point out what is granted, in such certain terms, that the grantee may be able to ascertain by inspection and know at the time the location is definitely fixed, and it becomes operative, what specific tracts of land are granted, and what are excepted from the grant. These lands soon after the grant, were conveyed, in trust, under authority of the law, as security for the bonds issued, out of the proceeds of which, the road was constructed: and the proceeds of these sales are devoted by the trustees to the redemption of the bonds. Is this security to be impaired, or

Exception of
mineral
lands.

destroyed, by taking from the operation of the grant all lands in which at any future time gold or other valuable metals may be discovered? If so, all of the lands may sooner or later revert to the United States, and these bondholders, and those who, in good faith have purchased the lands of the company without being aware of the mines secluded in their lower depths, will be largely injured.

These words "mineral lands," used in the act, must be construed in a practical sense—as practical men would use them in contracting about them—must be construed with reference to their present known, or at least, obviously apparent condition. I had occasion to express my views in a general way upon this subject in *Cowell v. Lammers*, 10 Sawy. U. S. 249, 21 Fed. Rep. 206. In that case it is said, "by the words 'mineral lands' must be understood lands known to be such, or which there is a satisfactory reason to believe are such, at the time of the grant or patent." In that case, it was not necessary to go behind the date of the patent, which was issued to the company in accordance with, and in pursuance of the grant, and not to a trespasser in opposition to the grant, as in this instance. Those who make or take subsequent grants must see that there is something to grant. It is not enough to know, that the lands contain minerals, at the date of the issue of the patent, in order to grant them as mineral lands. It must be known, also, that there has been no prior divestment of title. I am satisfied that the lands ought not, only, to be mineral, in fact, but, also, to be known as mineral, or there should be satisfactory reason to believe them to be such, at the date when the grant takes effect, in order to fall within the exception, of mineral lands, in such sense, as to defeat the grant. And this is, evidently, the view of the supreme court, as there is no case, so far as I am aware, wherein that court has sustained an exception of "mineral lands," in these grants unless they were known to be mineral, at the time of the grant. This point is very fully considered by the court in *Colorado C. & I. Co. v. U. S.* 123 United States 326, 327. Says the court in that case, quoting from a prior decision: "We say, 'land known at the time, to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands, that the term 'mineral,' in the sense of the statute is applicable. We also say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land in which years afterwards rich deposits of mineral may be discovered." It is quite

possible that lands settled upon, as suitable, only for agricultural purposes, entered by the settler, and patented by the government, under the pre-emption laws, may be found years after the patent had been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term 'known to be valuable at the time of sale' to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued." 123 U. S. 327. This was but affirming similar views before expressed in *Deffeback v. Hawke*, 115 U. S. 404. In this case, the supreme court also affirm the view of the circuit court expressed in *Cowell v. Lammers*, *supra*, that an exception inserted in a patent, in express terms, by the secretary of the interior, not required or authorized by the statutes, is void.

Now, in this case, according to the allegations of the complaint, after the grant had been made, and all the conditions fully performed by the grantee, the road accepted by the president, and the title irrevocably vested in the grantee, and, before there was any authority at all to survey mineral lands, as in the case of *Cowell v. Lammers*, the township and section including the lands in question, were surveyed, as agricultural lands, and so returned and represented to the land-office; and they were so regarded until the discovery of gold-bearing quartz, many years afterward, in 1883, when a patent was refused the railroad company, and issued to defendant's grantor. This discovery, in our judgment, was too late. There was at the date of the legislative grant, and for many years afterwards, nothing appearing in the nature of a valid exception to take the premises in controversy out of the operation of the grant, the department, in issuing the patent to defendant's grantor, instead of to the railroad company, seems to have acted in view of the condition of things, as they appeared after the discovery of the gold bearing quartz, in 1882, and not as they appeared, and were known at the time of the making of the congressional grant; the performance of the conditions of the grant by the grantee; and the subsequent survey made by the government in 1866-67, as agricultural lands.

It is further objected, that the patent thus issued to defendant's grantor, cannot be, collaterally, attacked, in an action of ejectment—that it can only be impeached by a direct proceeding in equity to declare it void, or control whatever title passed by it for the benefit of the party equitably entitled. This, it appears to us would have been the better course, and at first we were dis-

Collateral attack.

posed to think it was the only course. But upon further consideration, and an examination of the authorities, we think the case does not fall within that rule. In recognizing the rule insisted upon in a proper case, the supreme court, in *St. Louis, S. & R. Co. v. Kemp*, 104 U. S. 641, add: "Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act."

And in *Wright v. Roseberry*, 121 U. S. 519, the supreme court quote, and approve the foregoing, and further quote and approve another passage, as follows: "A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed." They cite other authorities to sustain this view. Now, those observations cover the case. The point was, also, directly decided in *Doolan v. Carr*, 125 U. S. 618. These lands under the allegations of the complaint, "had previously been disposed of" by legislative grant, and the United States had no interest left to grant. There was no jurisdiction left to dispose of them to somebody else as there was nothing to dispose of. And the court says: "A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands, * * * or that they had been previously transferred to others."

That is this case. Had the department issued a prior patent to the railroad company, and then one to the defendant's grantor, there can be no doubt that it would be the duty of the court in this case to determine which carried the title. If the first patent was valid, there would be nothing upon which the second could operate. So in this case, if the congressional grant was valid, and operative, there was nothing upon which the patent to the defendant's grantor could operate, and it is competent for the court in this case to ascertain which grant took the land.

Upon the views expressed, the demurrer must be overruled, and it is so ordered, upon the usual terms.

SABIN, J., (*concurring*).—I fully concur in the decision just read, but I desire to add a word in confirmation of it, or rather in regard to a matter connected therewith, that has often arisen before the court, and which is very liable to arise in the future. In the judgment just rendered it is decided that the grant by congress, under discussion, was a grant *in presenti*, and that upon compliance with the terms of the grant the title to the land vested in the railroad company. This matter has been so often before the court, and so often decided by this court, and the supreme court, that it is not worth while to mention it further. There seems in this matter, where the government has issued title to land, either to railroad companies or to the state, by way of its school lands, or to private parties, to be a misunderstanding on the part of many people that all these lands are still subject to exploration by outside parties for mines, or anything else, the same as though they were public lands of the United States. The act of congress which opens the public land to exploration for mines speaks only of public lands. Indeed, it is public land only that congress has authority to grant a license to go upon. I think, after the government has, as in this case, divested itself of the title to the land, that any man going upon the land to explore for mines, or anything else, is a mere trespasser. The lands are to that extent withdrawn from exploration for mines; and I am utterly at a loss to see how any one can assume that he can acquire a legal title to a mine upon my land, or on any one's land, the title of which has been divested from the government, or how he can assume to acquire any such title from any act of congress that I have any knowledge of. As I observed, these matters have incidentally come so often before the court for discussion that I think it worth while to call the attention of the profession to the fact that by the express terms of congress only public

Right to explore for minerals.

land is open for exploration for mineral. As said by the supreme court in the case of *Belk v. Meagher*, 104 U. S. 279, location confers no right of entry upon lands, unless the previous right to enter on that land to locate a mine, or for other purposes, pre-existed. Right of entry is the paramount thing. If a man has a right to enter upon the public land, or a right to enter upon my land, to explore for mines, then he may make a location; but if he has not that right of entry in the first instance, then his location amounts to nothing, whatever he may discover. I know of no law that gives any one a right to explore my land, or any companies' or corporations' land, for the purpose of making a location upon it. The supreme court has often held that no right of pre-emption or otherwise can be initiated by trespass.

Right of Railroad Company to Maintain Ejectment for Lands Granted.—See *Northern Pac. R. Co. v. Lilly* (Mont.), 24 Am. & Eng. R. Cas. 111.

Land Grant in Presenti—Building of Railroad.—While the act of June 3, 1856, granting certain public lands to the state of Michigan for railroad purposes, was intended as a present grant of the lands included in its terms, no further conveyance by the government being contemplated, yet the grant did not become operative or divest the title of the United States to any particular lands until they had been earned by the building of a certain number of miles of road, and selected by the railroad company. Such act, however, did not attach to lands which, at the date of the act, had been reserved to the United States. *Shepard v. Northwestern Life Ins. Co.*, 40 Fed. Rep. 341.

Same—Failure to Perform Conditions.—Defendants in this case claimed title under a deed from the Amboy, Lansing & Traverse Bay Railroad Company, the original grantee of the land under the act of congress. Plaintiff claimed under a deed from the Jackson, Lansing & Saginaw, which had succeeded to the rights of the Amboy Company upon its failure to perform the conditions of the grant. *Held*, (1) that the Amboy Company had never earned the lands in question, and that its deed to defendants was inoperative to pass the title; (2) that congress, by an act of July 3, 1866, had elected to forfeit the right of the Amboy Company to the lands then unearned, upon its failure to perform certain conditions, and, upon such failure, had authorized the state legislature to confer the grant upon some other corporation; (3) that the Amboy Company failed to perform such conditions, and the legislature thereupon conferred its grant upon the Jackson Company, under an arrangement to that effect between the two companies; (4) that, even if no forfeiture was intended, the acts of the legislature and of the two companies operated as a surrender by the Amboy Company of its rights, and the investiture of such rights in the Jackson Company; (5) that the Jackson Company was not the mere assignee of the Amboy Company, and did not take the unearned lands subject to its conveyances; and hence that patents of these lands, subsequently issued to such company, did not inure to the benefit of the grantees of the Amboy Company. *Shepard v. Northwestern Life Ins. Co.*, 40 Fed. Rep. 341.

KETTLE RIVER R. CO.

v.

EASTERN R. CO. *et al.**(Minnesota Supreme Court, October 4, 1888.)*

Contract for Exclusive Right of Way—Public Policy.—An agreement which, by its terms, gives the exclusive right of way to a railway corporation in or through a certain tract of land, in so far as it attempts to exclude other railway corporations from acquiring a right of way over the same tract, upon land not appropriated or required for its use by the covenantee, is against public policy, and void.

Charter—Power to Acquire Lands—Objection by Third Party.—A third party, not interested in lands taken for a right of way by a railway company, cannot raise the objection that the corporation has no power under its charter to acquire the specific lands for railway purposes.

Eminent Domain—Criterion of Public Use.—Where land is taken for its use by a railway corporation having the right to exercise the power of eminent domain, the question whether the use is public or private depends upon the right of the public to use the road and to require the corporation, as a common carrier, to transport freight or passengers over the same, and not upon the amount of business.

Covenant Running with Land—Agreement to Ship Freight Exclusively by One Line.—A covenant by a land-owner, by which he agrees that the products of a stone-quarry shall be transported to market exclusively over one line of railroad, is not a covenant real, and does not run with the land.

Same—Enforcement against Purchaser with Notice.—A purchaser is bound to inquire into the title of his vendor, and is affected with notice of any equities which appear upon the same. And, in equity, covenants relating to land or its mode of use or enjoyment are frequently enforced against grantees with notice, though there is no privity of estate, and they are not such as, in strict legal contemplation, run with the land. But they must be such as relate to or concern the land or its use. It is not enough that a covenant affects the use of the land or its mode of enjoyment in a collateral way.

Same—Agreement for Exclusive Transportation.—The class of covenants falling within the equity rule considered, and *held* not to include an agreement for the exclusive transportation of the products of land by a railway company extended to or built over it.

APPEAL from District Court, Pine County.

Lusk & Bunn and *Geo. L. Bunn* for appellants.

Jas. Smith, Jr., and *W. A. Barr* for respondent.

VANDERBURGH, J.—The plaintiff was incorporated under the
40 A. & E. R. Cas.—29

General Laws in 1886, and, as is alleged, possesses the usual powers and franchises of railway corporations, and is authorized to build and operate a railway, with one or more tracks, from a point on the line of the St. Paul & Duluth Railroad in the county of Pine, in township 42 north of range 20, extending thence to a point on the right bank of Kettle river, in the same township, with extensions to reach any or all industries that are or may be hereafter established in said township, and localities adjoining the same, with all necessary and convenient tracks, side tracks, or track extensions, grounds, etc., and with the right to locate a branch southerly to another point on Kettle river, and another to the east line of the state, with all necessary side tracks, etc.; it being the declared purpose of the company to operate such line or lines in connection with the St. Paul & Duluth Railroad. Prior to the incorporation of the plaintiff, the Kettle River Sandstone Company had been incorporated, and had become possessed of the title in fee to the lands in township 42, which are particularly described in the complaint, and upon which are large and valuable deposits of merchantable sandstone, which, it is alleged, could not be quarried and transported to market without the construction of a railroad to reach the same; and thereupon negotiations for such purpose were entered into between the plaintiff and the sandstone company, which finally resulted in the execution by them of the following indenture, with mutual covenants, and which forms the basis of this action:

" This indenture, made and concluded this first day of November, 1887, by and between the Kettle River Sandstone Company, a corporation existing in the state of Minnesota, party of the first part, and the Kettle River Railroad Company, also a corporation existing in said state, party of the second part, witnesseth: That whereas, the first party is the owner in fee-simple of the following real estate situate in the county of Pine and state of Minnesota, described as follows, to-wit: The southwest quarter, and the south half of the northwest quarter, and southwest quarter of the northeast quarter, and the northwest quarter of the southeast quarter, of section three, (3); also the east half of the northwest quarter, and the east half of the southwest quarter, and the west half of the southeast quarter, and the southeast quarter of the northeast quarter, of section ten, (10); and the northwest quarter of the northeast quarter, and the northwest quarter of the southeast quarter, and the west half of the southwest quarter and the northeast quarter of the southwest quarter, and so much of the east half of the northwest quarter of section fifteen (15) as is not included or embraced in the town site of

Sandstone, as the same is surveyed and platted, and the plat thereof recorded in the office of the register of deeds of Pine county,—all in township forty-two (42) north, of range (20) west, according to the government survey thereof; upon which premises the said second party has, for the purpose of affording railroad facilities for the said first party, constructed its line of railroad, extending from a point of junction with the main line of the St. Paul & Duluth Railroad Company, in section eighteen, (18,) in said township and range, in said county of Pine, to a point on or near the right bank of Kettle river, in said section ten, (10,) town and range aforesaid, with side tracks and other railroad structures in and upon the premises of the said first party, above described, so as to afford facilities for the transportation of sandstone from the quarries of said first party now opened. And whereas, the principal value of the lands and premises of the said first party hereto consists of large and valuable deposits of marketable sandstone, and it is desirable for the said first party to secure the present and additional facilities to transport its marketable stone from said quarries, and other points of said premises, by having the second party extend its tracks and other connections from time to time, as hereinafter specifically provided; and such quarries may be opened and worked upon said real estate; and in consideration thereof, and to secure the said second party the right of way, and the right of transporting all of the said stone over its said line of railroad and extensions, upon the payment to said second party, its lessees, successors, and assigns, of a reasonable compensation for transporting the same: Now, therefore, the said first party, in consideration of the premises aforesaid, and of one dollar to it paid by the said second party, the receipt whereof is hereby acknowledged, does, by these presents, grant, bargain, sell, and convey to said second party, its successors, lessees, and assigns, forever, so much of said real estate and premises as may be necessary and convenient for the maintenance and operation of its line of railroad as the same is now constructed, or as the said second party may hereafter, from time to time, desire to relocate and construct the same, with all the necessary or convenient buildings, depots, engine-houses, water-tanks, turn-tables, and other structures, with all necessary and convenient turn-outs, yards and side tracks; and also to construct thereon, and forever maintain and operate, a line of railroad from some convenient point on its said main line, to be selected by said second party; running thence to a point on the west bank of Kettle river, in said section ten, (10); with all such portions of said real estate as said second party, or its successors and assigns, may require for additional tracks, side

tracks, depots and standing ground, and other structures, at such point and localities as said second party or its successors may, from time to time, select or designate. And also grants to said second party, its successors or assigns, the exclusive right of way, for railroad purposes, of such reasonable width as said second party, from time to time, require and designate, so as to extend, operate, and use the same, so as to reach all stone-quarries that may hereafter be opened or worked at any point, place, or locality within the limits of the real estate hereinbefore first described, and to connect such track or tracks with the tracks now or hereafter to be constructed by said first party, with the right also to bridge Kettle river at such points or places as may be designated by said second party from time to time, in order to reach the quarries that may be opened on the easterly side of said river : To have and to hold the above granted premises, rights and privileges to the said second party, its successors and assigns forever ; subject, however, to the right of said first party, its successors, its lessees, and assigns, to quarry and remove the stone from said premises for transportation as aforesaid : and for that purpose the tracks of said second party on said premises, other than that of its main line, shall, from time to time, be adjusted and extended so as to enable said first party, and its lessees, successors, and assigns, to quarry and remove stone from any of said premises for transportation as aforesaid. And the said second party, for itself, its successors and assigns, covenants with said first party, its successors, lessees, and assigns, that it will from time to time, as said first party, or its successors or lessees, shall open any quarry or locality upon said premises hereinbefore described, and to which said first party shall properly grade and provide a suitable road-bed for such track, or its extension, the second party will, upon reasonable notice thereof, tie, iron, and operate such track or extension in connection with its main or its other tracks, and so from time to time, as such track extension is graded and required, will tie, iron, and operate the same as above provided and will transport all stone so reached by its said tracks, when loaded upon its cars by said first party, its lessees or assigns, over its said line of railway, in connection with the railroad of the St. Paul & Duluth Railroad Company ; and for that purpose it will, upon request, from time to time, and within a reasonable time, furnish to said first party, its successors, lessees and assigns, upon its said tracks, convenient for loading, all cars necessary for the transportation of such stone. It is further agreed that, in case the said first party, or its successors, lessees or assigns, shall construct suitable railroad track or tracks from any of its quarries, or from the

main or side tracks of the said second party, to its dumping grounds, for the removal of offal and unmarketable stone and other material, the said second party will, on reasonable notice, furnish cars therefor, and transport such material, provided the same is loaded and unloaded by said first party, or its successors, lessees, and assigns, for which said transportation said second party shall be paid a reasonable compensation. And the said first party covenants, for itself and its successors, that all marketable stone hereafter to be quarried, removed and transported by rail, from the lands or premises hereinbefore first described, shall be worked, quarried, or transported over, and in connection with, the tracks of the said second party, and that the track of the said second party shall be extended to the same as aforesaid, so as to secure to the said second party, and its successors and assigns, the exclusive right to transport the same upon the terms and conditions aforesaid. It is further expressly and mutually agreed and covenanted that all and singular the grants and provisions hereinbefore set forth shall be and continue to be binding and obligatory upon the respective parties hereto, their respective successors, lessees, and assigns."

This instrument, duly executed and acknowledged by both parties, was recorded in the office of the register of deeds of Pine county, where all the lands lie, on November 26, 1887. And it also appears that the plaintiff has constructed its line of road from a point on the main line of the St. Paul & Duluth Railroad, through several sections, into and through several subdivisions of section ten, (10,) in township 42, with an extension and spur track in and through the stone-quarries referred to, and with proper side tracks, so as to accommodate the business thereof, and "transport all stone and other freights requiring transportation over its said road and its connections." The plaintiff also alleges that it has fully kept the agreement on its part, and furnished all necessary cars and rolling stock, and transported the stone quarried on the premises, and has procured, "from its connection with the St. Paul & Duluth Railroad Company," the perpetual right to transport, or have transported, all stone quarried or to be quarried upon said premises, from the quarries aforesaid, to St. Paul, Minneapolis, Stillwater, and all other points and connections reached by said lines of railway of said St. Paul & Duluth Railroad Company, at and for a reasonable compensation." It also appears that the right of way through certain portions of sections 10 and 15 referred to in the deed has been duly designated and appropriated. The main line of the defendant corporation, Eastern Railway Company, passes through the N. E. $\frac{1}{4}$ of section 10. Subsequent to the record of the in-

denture above referred to, and on the 30th day of November, 1887, the sandstone company entered into an agreement for a lease of certain of the lands in question, owned by them in sections 10 and 15, with the defendants Ring & Tobin, for the term of 10 years, under which they were to work the quarries, and market stone quarried from the same, for a royalty to be paid to the sandstone company, and which lease "was made subject to all of the rights and privileges, and the said second parties (Ring & Tobin) hereto are entitled to all the benefits, which may accrue to either of the parties hereto, by virtue of the contract" with the plaintiff, being the indenture referred to. The lease was recorded April 17, 1888. In the month of July, 1888, the Kettle River Sandstone Company conveyed the lands, embracing the quarries in question, by deed of bargain and sale to a corporation known as the "Northern Land Company." And on the 8th day of September, 1888, the Kettle River Sandstone Company, by an instrument under seal, released and discharged the lessees, Ring & Tobin, from all obligations and liabilities under the lease to them previously executed. A tripartite agreement bearing date August 20, 1888, was entered into between the Northern Land Company of the first part, defendants Ring & Tobin of the second part, and the defendant Eastern Railway Company of the third part. Under this agreement the Northern Land Company leased to Ring & Tobin lands in sections 10 and 15 in question, thereby giving them the exclusive right to occupy the leased premises, and to quarry and transport stone therefrom, and to operate necessary machinery thereon, for the business of quarrying stone and loading it onto cars. And the lessees, Ring & Tobin, on their part, agree that they will ship all stone to be transported from the demised premises by the line or lines of railway of the party of the third part, to all points reached by the same, and beyond said lines will, so far as reasonable and practicable, ship said stone over the line of the St. Paul, Minneapolis & Manitoba Company, "provided that the foregoing covenant shall not be binding until said third party shall have constructed a suitable line of railway into said premises." The agreement also contains proper covenants for the grant of such right of way to the party of the third part, for its tracks, as may be necessary for its business in connection with such quarries. And the Eastern Railway Company, party of the third part, covenants and agrees to construct a branch or extension of its road into and upon the premises so leased, and to transport all the stone quarried by the lessees to points reached by it. The plaintiff obtained a temporary injunction on the ground that the defendants were threatening to grade and extend the line of the Eastern Rail-

way over the tracks, premises, and property of the plaintiff, and to destroy the tracks, and divert and destroy its business, and render its line of no practical value. The facts as above stated are substantially admitted by the defendants in their answer, and they admit that, at the commencement of this action, the Eastern Railway Company was constructing a railroad from its main line into the said stone-quarries, upon the location indicated by the map annexed to the answer, for the purpose of reaching the quarries in question, in order to transport over its road the products thereof; and that it has acquired the right of way therefor, by deed, from the Northern Land Company; and they deny that the construction of their tracks has or will injure the tracks, side tracks, or property of the plaintiff, as alleged in the complaint; or that the construction of the said road will in any manner hinder or interfere with the said road of the plaintiff, except that, by legitimate competition, the Eastern Railroad expects to secure all or a portion of the traffic originating in the quarry; and they deny that the Eastern Railway Company has graded or built its railroad upon or touching any property of the plaintiff. They allege that only a part of its proposed line has as yet been built, and that if built, as proposed, it will touch the track or property of the plaintiff at one point only, and involve but one crossing thereof, and will result in no substantial injury or inconvenience to plaintiff's property except through the diversion of traffic.

1. The stipulation in the lease of the sandstone company to Ring & Tobin, which makes the lease subject to the contract between plaintiff and the sandstone company first above referred to, was binding only during the continuance of the lease. The plaintiff was not a party to it, and there was no privity between Ring & Tobin and the plaintiff. The lease might be terminated by their failure to comply with certain conditions therein specified, or by the voluntary act of the parties thereto, as was done. Ring & Tobin assumed no personal obligation or liability, and are not bound by the covenants in that contract, unless their present lessors, the Northern Land Company, are so bound. *McMillan v. Scott*, 76 N. Y. 141-144. And upon this point counsel do not appear to disagree.

Effect of
stipulation
in lease.

2. It will be observed that the indenture or contract with the plaintiff, which was made, among other things, "to secure a right of way" for its road, assumes to grant so much of said real estate and premises as may be necessary and convenient for the maintenance and operation of its line of railroad as is now constructed, or as the said second party may hereafter, from time

Contract for
exclusive
right of way.

to time, desire to relocate and construct, with all necessary buildings, side tracks, etc. And also "grants to said second party, its successors or assigns, the exclusive right of way for railroad purposes of such reasonable width as said second party may, from time to time, require and designate, so as to reach all stone-quarries that may hereafter be opened or worked at any point or place within the limits of the real estate hereinbefore described." This grant, being in derogation of common right, should receive a strict construction; but we think, taking the several covenants together, it was manifestly the purpose of the parties to exclude other railways from access to the quarries, and from any share in the transportation of the stone quarried therein. But the plaintiff did not, and could not, under the terms of its grant, acquire title to its right of way, or other lands necessary for its business, until the same was actually selected, located, and designated. Prior to such location, its grant was a mere "float," and no title passed to any definite portion of the premises. There was nothing, then, to prevent any other railroad company from acquiring by condemnation a right of way over any portion of the territory in question not already actually appropriated by the plaintiff. The plaintiff has no ground, therefore, upon which to base legal proceedings against the Eastern Railway Company, except for an injury or interference, actual or threatened, to its right of way, and grounds actually selected and designated for its use; for it is not apparent that it would ever want the particular land taken or occupied by the Eastern Company. And, in respect to the continuance of the injunction against the latter company, this presents the only practical question to be considered here on this branch of the case. The question as to that company's corporate authority, under its charter, to acquire a right of way over these particular lands for a branch or extension cannot be raised by a third party, who has no interest in the land taken, and whose legal rights are not affected. Should it attempt to take or cross the plaintiff's right of way under condemnation proceedings, the plaintiff will then be in a position to raise that question. But neither of these corporations can enter into a contract which courts will recognize as valid for such exclusive rights in the territory in question as the plaintiff claims. Neither could altogether exclude the other from the premises, or prevent land not already appropriated or shown to be required for its own corporate use from being taken or acquired in any lawful way by another corporation for a use which is recognized as public. Such contracts are against public policy, and void. *Greenh. Pub. Pol.*, 672, and cases cited; *Transportation Co. v. Pipe-Line Co.*, 22 W. Va. 626. It is in-

sisted, however, by the plaintiff, that the proposed branch lines to these quarries, which are the property of private owners, are for the accommodation of private interests only, and not for a public use, and hence that the power of eminent domain cannot be exercised; and that the contract must be deemed to relate to private interests only, and is not, therefore, subject to this obligation. But these corporations are each *quasi* public corporations, and are, under their charters, authorized to exercise the right of eminent domain, and the question whether the use is public or private does not depend upon the amount of business, or the number of persons who have occasion to use either road, but upon the right of the public to require the corporations to carry their freight. *De Camp v. Hibernia U. R. Co.*, 48 N. J. Law, 48. If all the people have a right to use the road, it is a public use or interest, though the number who have business requiring its use may be small. *Phillips v. Watson*, 63 Iowa, 33; *Clarke v. Blackmar* 47 N. Y. 156; *Lewis, Em. Dom.* § 166. The cases cited fully illustrate and support the principle, and of its correctness there can be no doubt. And it will be time enough to determine the full extent of plaintiff's rights in the tract in question when it shall attempt to define the extent and limits of the right of way and grounds claimed to be reasonably necessary for its use.

3. But the most important question in the case is whether the burden of the covenant in the deed of the sandstone company, whereby that company undertakes "that all marketable sandstone hereafter to be quarried, removed, or transported from the lands or premises described in the deed shall be worked, quarried, or transported over and in connection with the tracts of the plaintiff," rests upon the grantees of the sandstone company. The parties, undoubtedly, have very clearly expressed their intention that this covenant should bind the assignees and successors in interest of the parties. No mere form of words, however, is sufficient for such purpose; but the nature of the covenant and its relation to the estate must be such that the law will permit the intention to be effectual. *Masury v. Southworth*, 9 Ohio St. 348. Strictly speaking, at law there must be privity of estate existing between the parties when the covenant is made, and it must concern the land or estate. "The covenant must respect the thing granted or demised. When the thing done or omitted to be done concerned the lands or estate, that is the medium which creates the privity between the plaintiff and defendant." *Bally v. Wells*, 3 Wils. 29. It must inhere in or be attached to the land, or relate to its mode of occupation or enjoyment. And

Contract to
ship exclu-
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it runs with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. *Savage v. Mason*, 3 Cush. (Mass.), 505; *Shaber v. St. Paul Water Co.*, 30 Minn. 182. In some cases covenants in respect to lands are construed as equivalent to the grant of an easement or servitude, and as such held to attach to the land, and run with it regardless of change of ownership. *Weyman v. Ringold*, 1 Bradf. Sur. (N. Y.), 54; *Bronson v. Coffin*, 108 Mass. 175. Thus a covenant by a railway company to keep its right of way fenced, or a covenant by an adjoining owner for himself, and his heirs and assigns, to maintain a division fence, is construed to be a grant creating an easement. *Boyle v. Tamlyn*, 6 Barn. & C. 329; *Blain v. Taylor*, 19 Abb. (N. Y.), Pr. 230; *Easter v. Little Miami R. Co.*, 14 Ohio St. 51; *Hazlett v. Sinclair*, 76 Ind. 492.

In *Pitkin v. Railroad*, 2 Barb. Ch. 221, an agreement by the defendant with the owner of adjoining land to maintain a side track and depot at a particular point, and in *Gilmer v. Mobile & M. R. Co.*, 79 Ala. 569, a similar agreement, with the grant of the right to cultivate certain portions of the right of way, were supported on similar grounds; the chancellor saying, in his opinion in the first-named case, that "it was, in substance, the grant of an easement or servitude, which was to be binding on the property of the railroad company, as the servient tenement for the benefit of the complainant and those who should succeed him in his estate." But in any event these were covenants that could have been upheld and enforced in equity against all subsequent purchasers or owners with notice. But the covenant under consideration is, in substance, a traffic agreement, giving to the plaintiff the exclusive railway transportation of the product of the quarries. The track had been laid to the quarry when the agreement was made, and it contains provisions for its extension to other parts of the quarry at the joint expense of the parties. To secure this transportation was the consideration which induced the plaintiff to construct the road and enter into the contract. But it is not a covenant real, and does not run with the land as such. It is not of such a nature that it can be said to inhere in the land, nor does it grant any right or easement therein. As respects the land, plaintiff's grant is limited to its right of way, and the right to use and occupy such portions of the premises as it may require for its business. But it has no easement in the rest of the premises. It is to furnish track and cars for the transportation of stone, as it might, under other circumstances, to a lumber-yard or grain elevator, under a similar contract. It has no right to operate the quarry, and has no other interest in it. The quarried

stone is personal property which the sandstone company covenanted should be transported as freight by plaintiff's railway. But conceding the personal liability of that company for the violation of that covenant, it is not binding on the Northern Land Company, or its lessees, if it does not run with the land, or does not constitute a charge upon it. The case of *Hemingway v. Fernandez*, 13 Sim. 228, cited and relied on by the plaintiff, is dissimilar in important particulars. In that case there was a lease, and a tenure was created, and the stipulation, agreeing to transport all the coal mined from certain land, and to pay a certain rate per ton for all the coal so conveyed, was in the nature of a covenant for the payment of rent. 1 Smith, Lead. Cas. (8th Ed.) 187.

4. The Northern Land Company acquired its interest with notice of plaintiff's rights; for it is a general rule that a purchaser is bound to inquire into the title of his vendor, and is affected with notice of any equities that appear upon the title. *Leake*, Cont. 1236; *Hazlett v. Sinclair*, 76 Ind. 488. And here the deed containing the stipulation and covenants in question had been duly recorded. It is therefore very earnestly contended by the plaintiff that, since these parties have acquired their title and interest with notice, equity will not permit them to evade the covenant in relation to the transportation, but will enforce it by injunction. There is a growing tendency to incorporate equitable doctrines with common-law rules, and, in equity, covenants relating to land, or its mode of use or enjoyment, are frequently enforced against subsequent grantees with notice, though there is no privity of estate, and the covenants do not strictly run with the land. Mr. Pomeroy (3 Eq. Jur. § 1295) states the rule broadly as follows: "Where, in a deed, the grantor covenants concerning the land or its use, restricting certain specified uses, subjecting it to easements, servitudes, or the like, and the land is afterwards conveyed, or passes to one who has actual or constructive notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled, in equity, either to specifically execute it, or will be restrained from violating it. It is not material whether the covenant is or is not one which runs with the land. And in the leading case of *Tulk v. Moxhay*, 2 Phil. Ch. 774, the doctrine is stated as follows: "A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice."

Enforcement
of covenant
against pur-
chaser with
notice.

Under this rule, covenants are sustained and enforced

against assignees with notice, stipulating for a particular mode of improvement, occupation, or use of lands, and it is especially applicable to restrictive covenants, thus: Covenants in respect to the mode of building or occupying parts of a once common estate; certain stipulations made by the owners, or in deed, as to the use of ways, for light and air, etc.; reserving premises exclusively for dwelling-houses; prescribing manner of improvement; not to carry on particular trades or business; as, for instance, not to use premises for sale of intoxicating liquors, or for an inn, tannery, gas-house, etc. 2 Washb. Real Prop. (5th Ed.), 323; *Parker v. Nightingale*, 6 Allen (Mass.), 341; *Barrow v. Richard*, 8 Paige (N. Y.), 351; *Trustees of Columbia College v. Lynch*, 70 N. Y. 447; *Hodge v. Sloan*, 107 N. Y. 244; *Whitney v. Union R. Co.*, 11 Gray, (Mass.), 359; *Wilson v. Hart*, L. R. 1. Ch. 463; *Luker v. Dennis*, L. R. 7 Ch. Div. 227; *Town of Middleton v. Newport Hospital* (R. I.), 15 Atl. Rep. 802; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 214; *Appeal of St. Andrew's Church*, 67 Pa. St. 512; *Tulk v. Moxhay*, *supra*.

Such privileges or restrictions, which are sometimes called equitable easements, servitudes, or amenities, are enforced by injunction irrespective of the question of privity of estate, or the nature of the tenure, but they must be such as relate to or concern the land or its use or enjoyment. It is not enough that a covenant affects the use of land, or the enjoyment of an easement therein, or the value or profitability of the use thereof, in a collateral way. *Mayor v. Pattison*, 10 East, 130. That the plaintiff, as a common carrier, should have a monopoly of the transportation of the freight to and from the quarries is not a privilege affecting the land of either party to the covenant, except in a collateral way, though it might very seriously affect the amount and value of its freight business, and have been the chief inducement for constructing the road. In other words, equity follows the law in that it will not enforce a covenant as against the heir or assignee unless the obligation it imposes is one which attaches to or concerns the land or its use or mode of enjoyment. *Norcross v. James*, 140 Mass. 192.

In *Keppell v. Bailey*, 2 Mylne & K. 517, the owners of the Beaufort Iron-Works covenanted with the Trevil Railroad Company that they and their assigns would procure all the limestone used in their iron-works from the Trevil quarry, and carry it and the product of their furnaces over the Trevil Railroad to their works, paying a certain toll therefor. The Trevil Railroad was constructed in reliance upon this covenant. The iron-works were assigned, and the assignees undertook the construction of another railroad to other quarries.

The suit was brought for an injunction restraining the owners of the iron-works from using the new road to transport the limestone. The chancellor refused the relief asked, holding that the covenant, which assumed to bind assigns, was essentially personal in its character. "There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations." But, in respect to burdens or servitudes to be imposed permanently on the land, "there are certain known incidents to property and its enjoyment, certain burdens wherewith it may be affected, * * * in favor of persons other than the owner, all of which incidents are recognized by the law. * * * But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner." So in *Transportation Co. v. Pipe-Line Co.*, 22 W. Va. *supra*, an agreement by a land-owner that products of his land (in that case oil) should be transported exclusively by one company was not a real covenant, and would not be enforced against subsequent purchasers with notice, distinguishing (page 633 *et seq.*) the covenant in that case from those which are held to create equitable easements or servitudes or interests in land such as to bring them within the equitable doctrine of notice. *Keppell v. Bailey* has, in several instances, been referred to in the books as having been overruled, and it is said that the propositions of the chancellor therein laid down are not sustained by the courts of chancery.

Whether all that is said in that case is or is not strictly accurate we need not now consider, but we are unable to find that any court has ever undertaken to say that it was not correctly determined. And, in so far as the application of the equitable doctrine is concerned, we think that the cases of *Keppell v. Bailey* and *Transportation Co. v. Pipe-Line Co.* are not distinguishable from the case at bar. And, referring to *Keppell v. Bailey*, the learned American editor of *Smith's Leading Cases* (volume 1, p. 198) says, justly, we think, that "the covenant in that case failed to run with the land not so much because it imposed a burden, or from the want or privacy of estate, as because the rights and restrictions which are imposed on the one hand or conferred on the other went beyond the limits of any estate or interest in land known to the law, or which it will permit to be invested with the capacity for assignment or transfer; and sound policy will not allow an end to be attained by a covenant which cannot be directly effected by a grant." And, as before indicated, though a covenant is made by one for himself and assigns, yet, if the

thing to be done is merely collateral, and does not affect the land itself, though its use or enjoyment may thereby be rendered more valuable, an assignee is not bound at law or in equity. *Blain v. Taylor*, 19 Abb. (N. Y.), Pr. 230; *Mayor v. Pattison*, 10 East, 130.

The tendency of the later decisions, both in this country and in England, is, we think, to restrict rather than to extend the equitable doctrine of notice we have referred to. *Brewer v. Marshall*, 19 N. J. Eq. 546; *Transportation Co. v. Pipe-Line Co.*, *supra*; *Norcross v. James*, 140 Mass. 192; *Haywood v. Society*, L. R., 8 Q. B. Div. 408; *London & S. W. R. Co. v. Gomm*, L. R., 20 Ch. Div. 562; 11 Am. & Eng. R. Cas. 385; *Austerberry v. Oldham*, L. R., 29 Ch. Div. 750; *Grigg v. Landis*, 21 N. J. Eq. 502. The order appealed from is reversed, and the injunction directed to be dissolved as to the defendants Ring & Tobin, and modified and limited as to the Eastern Railway Company so as to restrain any interference with the lands, right of way, and property of the plaintiff.

MAYOR, ETC., OF MACON

v.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO.

(*Georgia Supreme Court, September 16, 1889.*)

Grant of Public Domain of City—Conditions—Acceptance.—Where a statute granting to a railroad company part of the public domain of a city, provides, in effect, that the grant shall not be operative without the assent of the municipal authorities, and that the terms, conditions, and limitations of the grant shall be matter of agreement between said authorities and the company, and where, on application of the company to the city for its consent, the municipal authorities lay down terms, conditions, or limitations, and there is not some writing, executed by the company, accepting or assenting to the same, the question of acceptance of the grant by the company is one of fact for decision by a jury.

Same—Acceptance—Failure to Fulfill Condition.—If the company did accept the grant with the limitation put on it by the city in giving its consent,—namely, for so long as the property should be used for railroad purposes, as specified in the statute,—the property, if not appropriated to any of these purposes within a reasonable time, would cease to be affected by the statute, and would again be the public domain of the city, just as it was before; there being no consideration for the grant, save the local benefits which might be expected to result from the use of the premises in the manner contemplated.

Same—Right of City to Re-enter.—If the grant was accepted, but ter-

minated, or became subject to be terminated, by reason of non-user, the proper party to re-enter or bring suit for the premises was not the state, but the city, whether the limitation to the uses expressed be regarded as a special limitation strictly, or only as a condition subsequent.

ERROR from Superior Court, Bibb County.

R. W. Patterson and Hill & Harris for plaintiffs in error.

Bacon & Rutherford for defendant in error.

BLECKLEY, C. J.—As the court below restricted the functions of the jury to the single question of identity of the premises in dispute, we shall deal with the case and discuss it only far enough to show that this restriction was erroneous. We think two additional questions were for determination by the jury,—the first being whether the Macon & Brunswick Railroad Company accepted the grant made to it by the state in conjunction with the city of Macon ; and the second, whether, if it did, that company, or its successor, the East Tennessee, Virginia & Georgia Railway Company, lost the grant by failure to devote the property, within a reasonable time, to the objects and purposes for which it was acquired. Questions for jury.

1. At the time the act of 1863 (Acts 1863, p. 225) was passed, the title to the Macon reserve was not in the state, but was in the corporate authorities of the city of Macon ; the same having passed out of the state by the act of 1856, (Acts 1855-56, p. 495.) It was not the purpose of the act of 1863 to grant to the Macon & Brunswick Company a donation of gratuity ; for the act was not passed by the general assembly in the method prescribed touching donations by the constitution of 1861. Code 1863, § 4948. Had it been so passed, the yeas and nays would have been entered on the journals of each house. *Id.* § 4940. We have examined these journals, (House, p. 167 ; Senate, p. 146,) and find that the yeas and nays were not so entered. The act may well be construed, therefore, (since by its own terms it would have no force without the assent of the city council of Macon,) as a conveyance from that municipality to the railroad company, made in consideration of local benefits to the city expected to be derived from the use of the property in the manner contemplated by the act. The preceding act of 1856 expressly disabled the city to alien, or even offer to sell, alien, or convey. The act of 1863 took off this restriction as to the premises to which the latter act applied. Perhaps the more accurate view would be to treat the act as a joint grant made by the state and city ; the title to the property at that time being in the city, and the city's assent to the grant being expressly required. The language of the act, Statutes granting lands.

including the caption thereto, is as follows: "An act to grant the use of certain grounds in the Macon reserve to the Macon & Brunswick Railroad Company, and the Milledgeville Railroad Company, for depot purposes, with the consent of the city of Macon. Section 1. Be it enacted by the general assembly of the State of Georgia that the state of Georgia will, and hereby does, grant to the Macon & Brunswick Railroad Company and the Milledgeville Railroad Company ten acres each, out of the lands belonging to what is known as the 'Macon Reserve,' to be used by said railroad companies for depots, shops, and other conveniences and fixtures necessary for said railroad companies, (the assent of the city council of Macon being first had thereto,) upon such terms, conditions, and limitations as shall be agreed upon between the city council of Macon and said railroad companies." Section 2 repeals conflicting laws. It will be seen that the "terms, conditions, and limitations" were left to be agreed upon between the city council and the railroad company. Of course, therefore, no title whatever passed to the company by mere force of the act itself. It follows that whether any terms, conditions, and limitations were agreed upon, and, if so, what these were, must be determined as a preliminary for holding that the company acquired any interest in the land; and surely these matters cannot be adjudicated as pure questions of law, but are in large degree questions of fact, depending upon what took place between the city council and the company, and upon subsequent conduct, as shown by the evidence, both written and unwritten.

If enough appeared in the documents to form the basis of a conclusive legal presumption that the company accepted the grant upon the terms, conditions, and limitations laid down in the report of the committee, which the city council adopted, then the aid of the jury upon this part of the case could be dispensed with; but no writing appears in the record which shows that the company ever agreed to the terms, conditions, and limitations proposed by the city council. Without such agreement, either express or implied, what the legislature did, and what the city council did, would be of no avail, since, by the provisions of the act, some agreement between the council and the company was absolutely essential. Admitting that it would follow, from the fact that the action of council was in response to a petition made to it by the company, that the company's acceptance might be presumed, yet this presumption would not be conclusive. It would only be *prima facie*, and might be overcome by circumstances tending to show that the company did not accept; such, for instance, as that it

Acceptance of
grant.

never took possession of the premises, or exercised dominion over them, and delayed for an unreasonable time appropriating them to the use contemplated by the grant. It would be extremely harsh and arbitrary logic to infer, with the force of a conclusive presumption, that, because the company invited the city to consult, it thereby gave the city a *carte blanche* to fix any terms, conditions, or limitations it might choose to impose.

2. There can be no doubt that, if the Macon & Brunswick Company accepted the grant on the terms fixed by the city council of Macon, (and it could accept no other,) it was with the limitation that the estate acquired Limitation of grant. was to exist only so long as the property was used for the purposes specified in the act. Such a limitation is distinguished from an ordinary condition subsequent, inasmuch as it marks the limit or boundary beyond which the estate conveyed could not continue to exist. 2 Bl. Comm. 155, 156; 2 Minor, Inst. 263; 2 Washb. Real Prop. 23-25, (457-459;) Smith, Ex. Int. §§ 34-42; 2 Kent, Comm. 129; Henderson v. Hunter, 59 Pa. St. 335; Ashley v. Warner, 11 Gray, (Mass.) 43. Where the mode of use, however, not a special or collateral limitation, as we consider it, but a condition subsequent, the use would have to be begun within a reasonable time, in order to save the estate from forfeiture. Hayden v. Inhabitants of Stoughton, 5 Pick. (Mass.) 528; Allen v. Howe, 105 Mass. 241; Hamilton v. Elliott, 5 S. & R. (Pa.) 375. According to some authorities, a grant made for a charitable use is not forfeited by non-user. McKissick v. Pickle, 16 Pa. St. 140; Pickle v. McKissick, 21 Pa. St. 232. Here there was no charitable motive or object involved; and, as we have seen, the grant was not made by the general assembly as a donation or gratuity. Nor can we suppose that it was intended as such by the municipal authorities of Macon. Nothing was paid for it directly by the company, and no consideration is expressly mentioned in the documents relating to it; but there can be no doubt that local benefits were in contemplation, which benefits could be realized only by the use of the property in the manner specified.

As long as the company held it with a view to improve and use it in that manner, the holding was not inconsistent with the terms of the grant; but after the lapse of a reasonable time, under all the circumstances, for the actual use to commence, if it did not commence the company's estate was terminated *ipso facto*, if the words relating to the use be construed as a limitation, and if construed as a condition subsequent, the estate was forfeited, or became subject to forfeit.

Failure for a reasonable time to apply lands to purposes of grant.

ure upon entry made, or action brought in behalf of the proper party. In some jurisdictions the question of reasonable time seems to be for decision by the courts; but under our system, where, as in this case, some of the facts bearing upon the case are not evidenced by writing, we think the solution of the question is for the jury. If the grant had been otherwise paid for by the company, it might well be said that no question of reasonable time would be involved, or, if involved, that a very remote time would be reasonable. But, any and all other considerations being wanting, it results that a period of time reasonably necessary for the purpose, under all the circumstances, must have been in contemplation; for otherwise the property might have gone out of use altogether. If the company could hold it beyond a reasonable time without commencing the use, it could do so for all time; so that, if reasonable time be not the limit to non-user, there is no limit whatever. It follows, from what has been said, that, if a reasonable time had elapsed before the assets of the Macon & Brunswick Railroad Company were seized and sold out, that company had lost the grant, and these premises were not its property at the time of the sale. But, if a reasonable time had not then elapsed, the company now claiming as its successor would be entitled to any additional time required, when added to the time already elapsed when it succeeded to the former company's rights, to complete the period; and if, when this action was brought, the period of reasonable time was complete, whether completed while the right was in the former company, or not until the latter acquired it, the present action was maintainable, provided it was brought by the proper party.

3. We have no doubt whatever that the proper party to bring the action was the mayor and council of the city of Macon. That corporation had the title, under the act of 1856, save in so far as it parted with the same under the act of 1863. The state never has resumed the title to any part of Macon reserve, but, on the contrary, by the act of 1866, (Acts 1866, p. 89.) has for a consideration, to-wit, \$10,000, paid by the authorities of the city of Macon, relinquished to the city council all the state's contingent interest, and vested the same in the mayor and council. We do not cite this last act as legislation necessary to the conclusion which we have reached; for, whether the title of the railroad company was terminated by limitation or by condition subsequent, the title would go back to where it was, under the act of 1856, and, if re-entry or suit was necessary to such a restoration of title, the proper party to re-enter or to bring suit would be the city of Macon, and not the state.

**Right of city
to re-enter.**

Except such matters as are involved directly or indirectly in the points we have discussed, we find no error in the record which we deem material; and we leave the new trial, which must be had, to take place under such light touching the law of the case as has been shed by this opinion. Judgment reversed.

STATE

v.

CENTRAL PACIFIC R. CO.

(*Nevada Supreme Court, September 25, 1889.*)

Land Grants—Non-payment of Costs of Surveys—State Taxation.—The act of Congress of July 10, 1886, which provides that "no lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by states, territories and municipal corporations, on account of the lien of the United States upon the same for the costs of surveying, selecting and conveying the same because no patent has been issued therefor," delegates to states and territories the right to tax the lands granted, although the grantees have not paid the costs of surveying and selecting.

Same—Taxation—Identification of Lands.—The act of Congress of July 1, 1862, operates as a grant *in presenti* of the lands therein specified to the Central Pacific R. Co., and the right of the state to collect taxes thereon under the act of 1886 cannot be defeated by the delay of the corporation in applying for patents, nor by the neglect or delay of the secretary of the interior to determine the character of the land and whether it falls within the grant, the identification of the land and its character being capable of proof upon the trial in an action for the taxes.

Same—Taxation—Absence of Title—Sufficiency of Plea.—An answer in an action by the state for taxes upon lands granted to a railroad company which denies all ownership to the lands "except such ownership as the defendant may have, obtain or secure, as yet unknown and uncertain on account of the non-action of the government through its land department," is evasive and uncertain, and is not sufficient under the Nevada statute permitting the defendants in actions for taxes to deny all claim, title or interest in the property assessed at the time of the assessment.

APPEAL from District Court, Washoe County.

Action by the State of Nevada against the Central Pacific R. Co. to recover taxes upon certain lands granted to the defendant by Act of Congress. Defendant appeals from a judgment for the plaintiff.

Baker & Wines for appellant.

The *Attorney General* for the State.

MURPHY, J.—This action was brought by the state of Nevada to recover from the defendant a certain amount alleged to be due upon lands situate in Washoe

Case stated.

county, under the state and county assessment, for taxes in the year 1887. There was assessed to the defendant for that year 140,550 acres of land, valued at the sum of \$70,275. The complaint is in the form prescribed by the statute. The answer contains four defenses. To this answer plaintiff demurred on the grounds that the "answer did not state facts sufficient to constitute a defense to the action; that said answer did not deny all claim, title, or interest in the property described in the complaint at the time of the assessment; that there was no sufficient or specific denial of the allegations of said complaint; that the answer is ambiguous, uncertain, and unintelligible, in that it cannot be learned from the whole thereof whether said defendant claims said property therein described, or parts thereof, as exempt, being public United States lands, or disclaim and deny, or either, any claim, right, or interest therein." The demurrer was by the court overruled as to the first, second, and third defenses, and sustained as to the fourth. Defendant declined to amend. Judgment was entered in favor of the plaintiff for the taxes, penalties, and costs. Defendant appeals.

The fourth sub-division of the answer is as follows: "(4) Defendant, in further answering said complaint, alleges that no portion of the lands last above, and in subdivision third of this answer, described, nor in the following described lands, (also being a portion of the lands described in said complaint,) have ever been selected by this defendant, or set off, certified, or listed to this defendant by the land department of the government of the United States, nor by any other officer thereof, under the acts of congress of July 1, 1862, and July 2, 1854, known as the 'acts granting lands to the Pacific railroads;' nor has it ever been held, decided, or determined by the land department of the government of the United States, nor by any officer thereof, that any of said lands so as above referred to, were or are within the grants contained in said acts of congress; nor has it ever been determined or decided by the land department of the government of the United States, nor by any officer thereof, whether said lands were mineral or non-mineral in character, or whether they or any of them were embraced in or covered by any valid homestead or pre-emption, or any other lawful claim whatever upon the part of any citizen of the United States, nor by the government thereof, as a reservation or otherwise." Defendant further alleges "that it admits that all and singular the lands described in third and fourth subdivi-

sions of this answer are within what is known as the 'Forty-Mile Strip,' being twenty miles on each side of defendant's road as provided in said acts of congress; yet defendant alleges that it has not at this time, nor has it at any time, any knowledge or information as to the future or probable action of the land department of the government of the United States in relation to the issuance of patents to this defendant for the lands embraced in subdivisions three and four, nor has defendant any knowledge or information as to whether or not it will ever be able to obtain patents therefor; and the decision of such land department, which defendant is informed and believes must precede the issuance of such patents, has never been made or rendered by such land department, nor any officer thereof, nor have patents been issued there." In an amendment to the answer "defendant specifically denies that it now has or owns, or that it, at the time of the commencement of this action, or at any other time, or at all, had or owned any right, title, claim, interest, property, or possession of, in, or to any of the lands or premises described in the third and fourth paragraphs or subdivisions of said original answer, or of either of them, or of, in, or to any of said lands or premises, or that it had at any of the times mentioned in the complaint on file herein, save and except such right, title, claim, interest, property, or possession (now unknown and uncertain, as alleged by defendant in said original answer) as it, said defendant, may have, obtain, or secure under and by virtue of the various acts of congress, known as the 'acts granting lands to the Pacific railroads,' mentioned and referred to in such original answer, and such as it, said defendant may have, obtain, or secure under and by virtue of the decision and determination of the land department of the government of the United States, made and rendered under said acts of congress, and to which reference has been made by the defendant herein in its original answer."

The act of congress of July 1, 1862, to which defendant refers, is as follows: "Sec. 3. That there be, and is thereby, granted to the said company, for the purpose of aiding in the construction of said railroad, * * * and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers to the amount of live alternate sections per mile, on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead

Grant of
lands to Cen-
tral Pacific
R. Co.

claim may not have attached at the time the line of said road is definitely fixed: provided that all mineral lands shall be excepted from the operation of this act." The statute further enacted that whenever 40 consecutive miles of and portion of its road should be ready for the service contemplated by the act, supplied with all the appurtenances of a first class road, three commissioners were to be appointed by the president of the United States, whose duty it was to examine and report to him; and, if it should appear from such report that 40 consecutive miles had been completed in a good and workmanlike manner, then patents were to be issued to said road conveying the right and title to the lands granted to the company on each side of the road as far as the same should be completed, and patents were to be issued as each 40 miles of road were completed. On July 2, 1864, the act of July 1, 1862, was amended, by extending the grant for 20 miles on each side of said road, and reducing the number of miles of road to be completed by the Central Pacific Railroad Company from 40 to 20, when patents should issue for the lands granted. Also, by adding two sections to the original act: "Sec. 21. That, before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the treasury of the United States the costs of surveying, selecting, and conveying the same, by the said company or party in interest, as the title shall be required by said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the commissioner of the general land-office for the prosecution of the surveys of the public lands along the line of said road, and so from year to year, until the whole shall be completed as provided under the provisions of this act." "Sec. 22. That congress may, at any time, alter, amend, or repeal this act."

It is a well known fact that the Central Pacific road is and has been completed for a great number of years, and that it

Taxation of land grants. has earned and is entitled to receive its patents to the lands granted to it by the above mentioned acts of congress, whenever the said company shall pay into the treasury of the United States the costs of surveying, selecting, and conveying. Under the above mentioned acts the supreme court of the United States has said that the lands granted to the railroads were not taxable by the states or territories until such time as the companies had paid the cost of surveys. *Kansas Pac. R. Co. v. Prescott*, 16 Wall (U. S.), 603; *Union Pac. R. Co. v. McShane*, 22 Wall (U. S.), 444; *Northern Pac. R. Co. v. Traill Co.*, 115 (U. S.), 600, 25 Am. & Eng. R. Cas. 364. The decision in the latter case was

filed on the 7th day of December, 1885. Justice MILLER, in writing the opinion of the court, said: "We are aware of the use being made of this principle by the companies, who, having earned the lands, neglect to pay these costs in order to prevent taxation. The remedy lies with congress, and is of easy application. If that body will take steps to enforce its lien for these costs of survey, by sale of the lands, or by forfeiture of title, the treasury of the United States would soon be reimbursed for its expenses in making the surveys, and the states and territories, in which the lands lay, be remitted to their appropriate rights of taxation."

On the 10th day of July, 1886, congress passed "An act to provide for taxation of railroad grants, lands and for other purposes." "Section 1. That no lands granted to any railroad corporation by any act of congress shall be exempt from taxation by states, territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor, but this provision shall not apply to lands unsurveyed, provided, that any such lands sold for taxes shall be taken by the purchaser subject to the lien for the costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the secretary of the interior may by rule provide, and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands." Taking into consideration the opinions of the supreme court above referred to, and the remarks of Justice MILLER, in connection with the act of congress of July 10, 1886, it is evident that congress intended to, and did, delegate to the states and territories the right to tax the lands granted to railroad companies notwithstanding they had not paid into the treasury of the United States the costs of surveying and selecting, the government taking the chances of collecting such costs from the purchaser at tax-sale.

Delegation of power to tax land grants.

Defendant contends that the lands described in the complaint and answer are not subject to taxation for state and county purposes, because they have never been selected by, set apart, set off, certified or listed to the defendant by the government of the United States, through its land department, nor by any officer thereof; and that there has been no judicial or executive determination as to the character or *status* of such lands; that the government, as grantor, having the power of deciding, has not determined that such lands were within the grant, or that they were within the exception contained in the grant, to wit, pre-emption or homestead claims or mineral lands. The

Identification of lands included in grant.

words "that there be and is hereby granted," contained in section 3 of the act of congress of July 1, 1862, are words of absolute donation, and import a grant in *presenti*. Such words vest a present title in the grantee. The location of the road and a survey of the lands, are necessary to give precision to the grant. When that is done, and the work of constructing is prosecuted with due diligence, at the completion of each 20 miles of the road, as required by the act, the company was entitled to patents to the lands granted, and, by relation, these would take effect as of the date of the act of congress granting the same. *Railroad Co. v. Dyer*, 1 Sawy. (U. S.) 652; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733; *Northern Pac. R. Co. v. Traill Co.*, 115 U. S. 606, 25 Am. & Eng. R. Cas 364; *Wright v. Roseberry*, 121 U. S. 496; *Buttz v. Northern Pac. R. Co.*, 119 U. S. 66, 29 Am. & Eng. R. Cas. 455; *Washington & I. R. Co. v. Northern Pac. R. Co. (Idaho)*, 38 Am. & Eng. R. Cas. 670. The right of the state to collect taxes upon the lands embraced in the grants to the Central Pacific Railroad Company cannot be defeated by the delay of the corporation in applying for patents, nor by the neglect or delay of the secretary of the interior to take such steps as may be necessary to determine the character of the land,—whether it is mineral or non-mineral. The identification of the land, and its character, if raised by the pleadings, could be determined by the state district court upon the trial of the case.

In *Hannibal & St. J. R. Co. v. Smith*, 9 Wall. (U. S.) 97, which was an action brought to recover certain lands which the railroad company claimed under a grant of the lands from the government of the United States to the state of Missouri, and a statute of that state vesting the lands in the railroad company, the defendant, Smith, claimed title under a swamp-land grant. The supreme court held that it was competent to prove, by witnesses who knew the lands, that they were swamp and overflowed lands within the meaning of the swamp-land grant. By the acts of congress relative to the swamp-land grants, it was made the duty of the secretary of the interior to ascertain whether the lands were swamp and overflowed, and to furnish a certificate of the character of the lands to the state. The supreme court of the United States, in discussing the question as to the competency of parol proof in the state court to establish the character of the lands, said: "The grants of land by congress to the states in aid of railroads have generally been made with reference to the lands through which the roads were to pass; and, as the line of the road had to be located after the grant was made, it has been usual, in the acts making the

grant, to describe them as alternate sections of odd numbers within a certain limit on each side of the road, when it should be located. This, of course left it to be determined, by the location of the road, what precise lands were granted. So far as this uncertainty in the grant was concerned, it was one which might remain for a considerable time, but which was capable of being made certain, and was made certain, by the location of the road. But as congress could not know on what lands these grants might ultimately fall, and as the roads passed through regions where some of the lands had been sold, (some had been granted for other purposes, and some had been reserved for special uses,) though the title remained in the United States, these statutes all contained large exceptions from the grant, as measured by the limits on each side of the road, and as determined by the odd numbers of the sections granted. * * * By the second section of the act of 1850, it was made the duty of the secretary of the interior to ascertain this fact, and furnish the state with the evidence of it. Must the state lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the state did not depend on his action, but on the act of congress, and though the states might be embarrassed in the assertion of this right by the delay or failure of the secretary to ascertain and make out lists of the lands, the right of the states to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the land department with the state officers, he must, if he had attempted it, rely, as he did in many cases, on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to cross-examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed, and so excluded from the grant, under which plaintiff claims,—a grant which was also a gratuity? The matter to be shown is one of observation and examination, and whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became, because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose. Any other rule results in this: that, because the secretary of the interior has failed to discharge his duty in certifying these lands to the state, they therefore pass under a grant from which they are excepted beyond doubt; and this, when it can be proved, by testimony capable of

producing the fullest conviction, that they were of the class excluded from plaintiff's complaint."

The case of *Wright v. Roseberry*, *supra*, was appealed from the supreme court of the state of California. The opinion was written by Justice FIELD, and all the authorities were elaborately reviewed. The result and conclusions as stated by the learned justice are as follows: "The result of these decisions is that the grant of 1850 is one in *præsenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the secretary in identifying them is conclusive against collateral attack as the judgment of a special tribunal to which the determination of the matter is intrusted; but, when that officer has neglected or failed to make the identification, it is competent for the grantees of the state, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. A resort to such mode of identification would also seem to be permissible where the secretary declares his inability to certify the lands to the state for any cause other than a consideration of their character. * * * The court below held, and placed its decision upon the ground, that because the commissioner of the general land-office had not certified the lands in controversy to the state as swamp and overflowed, when this action was commenced in 1870, there was no title in the state by the grant of 1850 which could be enforced, thus making the investiture of title depend upon the act of the commissioner instead of the act of congress; whereas the certificate of that officer, when the previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated, and of the completeness of their segregation. The decision is in conflict with its previous decisions, and with the adjudged cases to which our attention has been called. * * * For the error in holding that the certificate of the commissioner was necessary to pass the title of the demanded premises to the state, the case must go back for a new trial, when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the swamp-land act of 1850 took effect." It is true, as claimed by appellant, that the parties and facts were different in the above cases from the one under consideration, but the principles therein enunciated cannot be distinguished from the principles involved in this case, either as to the character of the grant being one in *præsenti*, or the right of the parties to determine in the state court whether any portion of the lands upon which the right to collect taxes is involved are exempted from the grant.

Are the averments in the answer sufficient to constitute a defense? and are they sufficient denials of the ownership of the property assessed? Our statute provides that the pleadings should contain a statement of the facts constituting the cause of action or defense in ordinary and concise language. The statute also defines the several defenses that may be interposed in suits brought for the recovery of delinquent taxes. "Sec. 1108. The defendant may answer * * * *third*, denying all claim, title or interest in the property assessed at the time of the assessment." There is nothing ambiguous in this language, and the pleadings tested by demurrer should strictly conform to this provision of the statute. The answer of the defendant, "denying all ownership to the lands described in the fourth subdivision, except such ownership as the defendant may have, obtain or secure, as yet unknown and uncertain on account of the non-action of the government through its land department," is evasive and uncertain, and is not such a denial as would raise an issue as to whether the property was properly assessed to it, and is not such as the defendant is permitted by the statute to make. The character of the lands—as to whether there were any pre-emption or homestead claims or mineral lands included in the assessment—could be determined by observation and examination, and it was the duty of the defendant to make such an inspection as to be able to set forth, in the answer, that the lands were of the class excluded from the defendant's grant. The defendant not having done so, the demurrer was properly sustained. The judgment is affirmed.

TEXAS & PACIFIC R. Co.

v.

SOUTHERN PACIFIC R. Co.

(*Louisiana Supreme Court, November 18, 1889.*)

Public Policy—Contracts Tending to Create Monopolies.—All contracts which have a tendency to stifle competition, or to create or foster monopolies, with a view to unreasonably increase the market value of commodities, are against public interest, and contrary to public policy, and hence such contracts can confer to the parties thereto no rights which courts of justice can recognize and enforce.

Competing Railroads—What are.—Two railroad companies which have each a through and separate line of communication between two given points, are held to be competing companies for all traffic between such points.

Pooling Arrangement between Competing Lines—Validity.—An arrangement by which two competing systems of railroads agree to divide their earnings for traffic between given points, for which they were previously competitors, is against public interest, contrary to public policy, and cannot be judicially enforced.

Same—Enforcement of Illegal Contract.—In disposing of such cases, courts will not decree the nullity of the contract sought to be enforced. They simply abstain from dealing with it, or adjudicating any rights arising thereunder, or giving their aid for the division of results, although ascertained, between the parties thereto.

APPEAL from Civil District Court, Parish of Orleans.

Howe & Prentiss for plaintiff.

Leovy & Blair for defendant.

POCHE, J.—Plaintiff's object is to enforce specific performance of one of the stipulations contained in a contract or agreement executed by the two corporations on the 26th of

November, 1881, and modified or amended on the 18th of February, 1885. The agreement was entered into, on the one part, by several railroad companies operating in the states of Texas and Louisiana, then controlled, and therein represented, by Collis P. Huntington, of the city of New York; and, on the other part, by several similar corporations, also operating in Texas and in Louisiana, then under the control of Jay Gould, of the city of New York, and who therein acted in behalf of said companies. The expressed object of the contract was to adjust certain differences existing between the companies represented by Huntington and those represented by Gould, and to put an end to existing litigation growing out of such differences and difficulties. Hence the instrument signed by the parties, and the amendment thereto subsequently made, contained numerous stipulations intended to carry out the object proposed, and all have apparently been executed, save one, which is the subject-matter of this controversy. That feature of the contract is in the following words:

Contract between the parties.

“(6) Mutual agreement to pool New Orleans and Galveston traffic, and not to discriminate against Mississippi termini: “It is further mutually agreed that all unconsigned business (meaning all business whereof the route has not been designated in advance) destined for points west of El Paso, received by the said Texas and Pacific Railway Company, shall be turned over to the Galveston, Harrisburg and San Antonio Railway Company at the ‘Junction,’ or to the Southern Pacific Railroad Company at El Paso, as the case may

be; and all such 'unconsigned business received by the Southern Pacific Companies, and destined to places east of the 'Junction' reached by the Texas and Pacific Railway, and its connections, north of Shreveport, La., and west of the Mississippi river, shall be delivered to the Texas and Pacific Railway Company at the 'Junction,' or at El Paso, as the case may be. The gross earnings on all business passing over either of these roads between El Paso or the 'Junction' and New Orleans shall be divided equally; and the gross earnings on all business passing over either of these roads between El Paso and the 'Junction' and Galveston shall be divided on the basis of two-thirds thereof to the Galveston, Harrisburg and San Antonio Railway Company, and its connections; and the agents are to divide, as nearly as possible, such business between the two through lines, so that each shall do the proportion of business above allotted.

"In the event that either of said companies of the one party, at either of the termini herein mentioned, shall be unable, or shall neglect or refuse, for any cause, to take the business, and to perform the said services, in the proportions above named, the company or companies of the other party shall be at liberty, so long as such disability continues, to take such business and perform said service, and shall be entitled to receive the compensation therefor. The Texas and Pacific Railway Company, the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, the St. Louis, Iron Mountain and Southern Railway Company, the International and Great Northern Railroad Company, and the Galveston, Houston and Henderson Railroad Company shall severally take the through business any of them may have to do under this agreement between El Paso and any point on the Mississippi river, without any discrimination as to rate or otherwise in favor of any line, road or transportation company, and with equal dispatch; and this provision applies to business destined to, or coming from, any railroad east of the Mississippi river.

"There shall be no discrimination as to local business by any of the roads of either of the parties, as against those of the other party; it being understood that the term 'through business,' as used in this agreement, applies to traffic carried to and from terminal, common, or competitive points; and any point upon the lines of the railways of the parties hereto that may be reached, directly or indirectly, by any railroad competitive to either of said roads, is understood to be a competitive point."

The amendment of February, 1885, in so far as this section of the contract is affected, provides a different mode of di-

viding the earnings. It also extends the traffic covered by the agreement to all the business between New Orleans and El Paso on the one hand, and Galveston and El Paso on the other, whether the traffic originated at these points or not. Among other stipulations which have no bearing on the issues herein involved, the amendment contained the following modification: "It is a part of the agreement of the parties hereto that, in consideration of the premises, the said party of the second part, and his associates, and the companies on whose behalf he executed the said agreement of November 26th, 1881, release the said party of the first part and his associates, and the companies on whose behalf he executed such agreement, from all claims down to November 1st, 1884, arising under article 6 of said agreement."

Plaintiff's demand is based exclusively on the section herein above transcribed, and embraces three separate claims growing therefrom. Its object is to recover the excess of earnings realized by the defendant company from the 1st of November, 1884, to March 31, 1887, alleged to amount, as shown by defendant's reports made from month to month during that space of time, to the sum of \$330,717.78, and a similar excess, alleged to amount to \$200,000, from March 31, 1887, to January, 1888, during which time the defendant made no report, the defendant having ceased and refused to further report or account after March, 1887; and it urges an additional claim, of \$5,859.49, for an excess of earnings in its favor in the operation of certain lines of railroads in New Mexico and Arizona, thus footing up the claim at the aggregate sum of \$556,577.27. And plaintiff's demand finally covers such additional claims growing out of the contract in suit as may be discovered and ascertained on trial.

For defense, the following exceptions were pleaded: "(1) That the contract sued upon, being a railway pool, between competing railroad companies, to divide between them their earnings from competitive traffic, is illegal, for the reason that it is injurious to public interest, and contrary to public policy; and hence it cannot be enforced by a court of justice. (2) That the contract was forbidden by the provisions of the constitution of the state of Texas in force at the time that it was entered into. (3) That, if ever valid, the contract was terminated by the provisions of an act of the congress of the United States approved February 4, 1887, entitled 'An act to regulate commerce,' which went into effect on the 3d of April, 1887, and is generally known as the 'Interstate Commerce Act.'"

The judgment below was in favor of the defendant, and plaintiff appeals.

A point which overshadows the discussion of all three of the exceptions is made by plaintiff's counsel, who contend that, the agreement between the parties having been sanctioned by a decree of the courts in which the litigation adjusted between the railroad companies was pending, it has now acquired the force and effect of the thing adjudged, and hence it cannot be attacked collaterally. As a general proposition of law, the contention is unquestionably correct, (Rev. Civil Code, art. 3078; *Adle v. Prudhomme*, 16 La. Ann. 343; *Rabun v. Pier-son*, 23 La. Ann. 696; *Oglesby v. Attrill*, 105 U. S. 605;) but, from the very nature of the principle, as shown by the authorities cited, it appears clearly that those matters only which were covered by and included in the compromise or agreement are affected as things adjudged, as a result of the adjustment, even when the same is subsequently sanctioned or confirmed by the judgment of a competent court. The rule invoked applies to matters of pre-existing differences which are settled and compromised, and not to agreements or covenants for future action and execution.

Collateral attack on agreement adjusting litigated matters.

Undoubtedly, the attempt of either party to the "Gould-Huntington" agreement to avoid collaterally the effect of the adjustment of any contentious matter, or of any litigious rights involved in litigation hitherto pending, and which had been in terms settled by the compromise, would not have been defeated by the simple application of the principle now under consideration. But the subject-matter of article 6 of the agreement, which is now in suit, was not a subject of contention between the parties, either as a difference or in the shape of any pending litigation, at the time that the agreement was entered into. In fact, it had no existence before, and was only brought into being or life by the contract of November 26, 1881; and it had no reference to the past, but its whole operation or effect was intended exclusively for the future. This was manifestly the understanding of all the parties at the time. It shaped the action of their counsel, who thereafter invoked judicial confirmation of the adjustment and it was the sole guide of the court when it rendered the decree now set up as *res adjudicata* touching all matters and stipulations contained in the "Gould-Huntington Agreement." In formulating its decree, the court was careful to enumerate in detail all the litigious matters which were in suit between the several railroad companies which had participated in the adjustment, and which were parties to litigation then pending before the court; and it requires no argument to show that no other matters or stipulations in the agreement were in any way or degree affected by the judg-

ment then rendered. To clear away any doubt which might thereafter exist or be suggested as to the precise meaning, bearing, intent, and effect of the judgment rendered, the court made the following explanation of its own decree as part of said decree: "The aforesaid decree is made to carry out the provisions *in this behalf* of said agreement, dated November 26th, 1881, which is hereby made a part of this decree, and, by consent of the parties and upon consideration by the court, is hereby ordered and decreed to be binding upon each and all of the parties thereto, in all stipulations and agreements, as *therein shown*, and said decree does not *otherwise affect or interfere with the provisions of said agreement.*" (Italics are ours.) Hence we conclude and we hold that the stipulations of article 6 of the "Gould-Huntington Agreement" have not the force and effect of the thing adjudged, and that they are lawfully liable to attack in the mode and manner herein adopted by the defendant corporation. This conclusion is, of course, mainly predicated on the theory, fairly deducible from the record itself, that the agreement, in its entirety, does not evidence a single and connected contract, depending on all its parts and stipulations for a proper execution as an effect flowing from the unity of the contract, but that the instrument, in its shape, was used as a means to facilitate the execution by two representatives of numerous obligors and distinct obligees of a series of varied and distinct contracts.

As controlling and representing the varied interests of a cluster of railroad companies, Huntington acted in behalf of the following corporations: The Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of New Mexico, and the Southern Pacific Railroad Company of Arizona, the Galveston, Harrisbunrg & San Antonio Railway Company, the Texas & New Orleans Railroad Company, and the Louisiana Western Railroad Company; and Gould, clothed with corresponding authority from his system of roads, stipulated in behalf and in the name of the following companies: The Texas & Pacific Railway Company, the International & Great Northern Railroad Company, the Missouri Pacific Railway Company, the Missouri, Kansas & Texas Railway Company, and the St. Louis, Iron Mountain & Southern Railroad Company. In this connection, the record shows to our entire satisfaction that the parties themselves did not understand that the instrument was intended to evidence a single connected contract, as appears from the following stipulation: "The foregoing agreement shall be submitted by the respective parties thereto to the several boards of directors which they respectively represent; and the same shall be accepted, adopted, ratified, confirmed, made, and de-

clared by said several boards of directors to be the act and contract of their respective corporations so far as the same affects them, respectively." And the same understanding appears in yet bolder relief from the language used in the following clause: "It is understood that either or any of the said several railroad companies, parties to this agreement, may maintain any action, either at law or in equity, against either, any, or all of the other companies, parties to this agreement, to protect any right secured by this agreement, to specifically enforce the same, or to recover damages for the breach of any stipulation in this agreement affecting its interests, and that no objection shall be had or taken to any such action by reason of the non-joinder of parties as plaintiffs; and all clauses in this agreement contained are to be so construed as to secure this right." The parties have thus construed their own contract, and have themselves qualified their agreement, in a manner which completely refutes the argument of plaintiff's counsel in the present case. It is true that by the act of incorporation in 1884, which created the defendant company in its present autonomy, all the corporations which were then represented by Huntington, with the exception of the Southern Pacific Railroad Companies of California, of Arizona, and of New Mexico, have all been fused into, and were made parts of, the same system, known as the "Southern Pacific Company;" but this does not alter the nature and legal effect of the original contract as executed and understood by the original parties to the agreement. That it was so understood is made manifest by a clause inserted in the amendment of the agreement under date of February 18, 1885, which stipulates, as was done in the original contract, that the modifications then made were to be submitted, for adoption and ratification, to the respective boards of directors of the companies represented respectively by Huntington and by Gould. We feel, therefore, fully warranted to treat and discuss article 6, now in suit, as a complete and independent contract, with a sole consideration, which was the mutual advantage to be derived therefrom by the companies to be affected thereby. The clause or contract, as shaped, has reference to no other portion of the agreement, which is complete, for the purposes originally contemplated, without the contract contained in that clause—as complete as the contract formulated in the section stands, without any reference to any or all of the other provisions of the agreement. In discussing that article, we have, therefore, no concern with any of the concessions made mutually by the parties to the agreement, as considerations for other matters specified, or other advantages yielded or obtained by the parties, respectively, in other portions of the agreement.

We shall now discuss the real nature and the legal effect of the contract evidenced by article 6 of the "Gould-Huntington Agreement." It appears from the record, in-

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legal effect of
agreement.**

cluding evidence taken on the trial of the exceptions, that the systems of railroad companies made parties respectively to the proposed arrangement had each a through and complete line of communication, absolutely independent of each other, except as hereinafter stated, from El Paso to Galveston, and from El Paso to New Orleans, the points of traffic for which the earnings of the contracting parties were to be divided. From El Paso to New Orleans, the Texas & Pacific, plaintiff herein, had a continuous line of communication of itself, and from El Paso to Galveston its means of communication were by its own line from El Paso to Mineola, and thence by the International & Great Northern Railroad Company, connecting with the Galveston, Houston & Henderson Railway Company, two of the companies controlled and represented by Jay Gould. The communication of the Southern Pacific, defendant herein, between El Paso and Galveston, was by means of the Galveston, Harrisburg & San Antonio Railway Company and the Galveston, Houston & Henderson Railway Company; and its means of communication between El Paso and New Orleans were through the lines of the Galveston, Harrisburg & San Antonio, the Texas & New Orleans; the Louisiana Western, and the Morgan's Louisiana & Texas Railway Companies—all then controlled by Huntington, and now parts of the Southern Pacific system. The only parcels or portions of the through lines between either of the three points of traffic used in common by the two systems are a line of 90 miles east of El Paso, and a short line between Galveston and Houston; and the rights of the parties to the use of these two lines were secured in the agreement of November, 1881, in two separate and distinct stipulations, outside, and entirely and safely independent, of article 6, now under discussion. There is no contention here as to the free exercise of that right.

Now, as at certain points, both in Texas and in Louisiana, it appears that the respective lines of the plaintiff's and defendant's system of roads are very far apart, there is no pretension that they are parallel roads; but, from the record as shown by the foregoing statement, it appears very clearly that for the traffic between El Paso and New Orleans, and between El Paso and Galveston, they were unquestionably competing lines. It cannot be doubted that shippers who desired, without the existence of the agreement contained in article 6, to consign goods either from El Paso to New Orleans, or the reverse,

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public policy.**

or from Galveston to El Paso, or the reverse, had the option to select either of the two lines, in accordance with the most favorable terms which he could obtain from either. He would then have had the advantage of the natural competition existing between the two rival systems. But, under the effect of the arrangement now under discussion, the shipper could derive no advantage as a result of his choice between the two, as the terms would be the same with either or both. It is therefore too clear for further argument or illustration that the first, the lasting, and inevitable result of the agreement to the public was to stifle competition, and, as competition is the life of trade, the effect of the contract must necessarily and inevitably have been injurious to public interest, and hence it was contrary to public policy.

We have been at great pains, and have devoted long and tedious labor, to examine all the authorities, consisting mainly of decisions rendered on the point by courts of last resort in this country, which were submitted to us by counsel in the case, and we reach the conclusion that American jurisprudence has firmly settled the doctrine that all contracts which have a palpable tendency to stifle competition, either in the market value of commodities or in the carriage or transportation of such commodities, are contrary to public policy, and are therefore incapable of conferring upon the parties thereto any rights which a court of justice can recognize or enforce. A reference to some of the leading and most pointed authorities on the subject may not be out of place in this opinion, notwithstanding its already formidable length.

In the case of *Hooker v. Vandewater*, 4 Denio, 349, the court had to consider a contract between the proprietors of several lines of canal-boats, who had agreed to establish fixed rates of freight and passage for a certain season, and to divide the net earnings among themselves according to fixed rules. The attempt of one of the contracting parties to enforce the agreement against a recalcitrant member of the combination was discountenanced. True, the contract fell under the ban of a special statute of the state; but the court nevertheless took occasion to sanction the general principle which underlies our conclusions in this case. The court said: "It is a general proposition that an agreement to do an unlawful act cannot be supported at law—that no right of action can spring out of an illegal contract; and this rule applies, not only when the contract is expressly illegal, but whenever it is opposed to public policy, or founded on an immoral consideration, the maxim being *ex turpi causa non orritur actio*." Hooker v.
Vandewater.

In the case of *Stanton v. Allen*, 5 Denio (N. Y.), 434, the

court refused its aid to enforce the payment of a promissory note growing out of transactions predicated on a similar contract, on the ground that such a contract cannot receive judicial sanction. We cull the following language from that opinion: "Though the branch of the law relating to public policy is liable to be misunderstood and extended beyond its proper dimensions, still it must not on that account be neglected or disparaged. The rule that contracts and agreements are void when contrary to public policy, when properly understood and applied, is one of the great preservative principles of a state." And, referring to the case herein previously quoted, the court said: "That decision being conclusive on the main point in the present case, I might have rested upon that authority alone, if I had not supposed that the occasion called for an opinion as to the legality of such an association upon the principles of the common law."

In Ohio an association of salt manufacturers entered into a combination for the purpose of selling and transporting that commodity. The court refused its aid to enforce its conditions, saying, among other things: "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade; and, for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public." Cent. Ohio Salt Co. v. Guthrie, 35 Ohio St. 666.

The doctrine finds additional support and sanction from the following authorities: Gibbs v. Consolidated Gas Co., 130 U. S. 408, 25 Am. & Eng. Corp. Cas. 369, in which the court took occasion to set down a rule peculiarly applicable to pooling arrangements between competing railroad companies, which are universally recognized and treated in jurisprudence as *quasi* public corporations. The learned chief justice, as the organ of the court, said, with great clearness and terseness: "Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with freedom of contract, * * * yet, in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial,

Stanton v.
Allen.

Central Ohio
Salt Co. v.
Guthrie.

Gibbs v. Con-
solidated Gas
Co.

because in contravention of public policy." See, also, Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U. S. 644; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Arnot v. Pittston, etc., Coal Co., 68 N. Y. 558; Craft v. McConnoughy, 79 Ill. 346; Morrill v. Boston & M. R. Co., 55 N. H. 537; Jackson v. McLean, 36 Fed. Rep. 213; Santa Clara Val. M. & Lumber Co. v. Hayes, 18 Pac. Rep. 392; Hamilton's note, 15 Fed. Rep. 667.

We are referred by plaintiff's counsel to several authorities which are quoted as antagonizing the views which we have adopted in this opinion; but we have not found any decision emanating from American courts of last resort which have enforced or recognized any rights flowing from a contract which had a tendency to stifle competition in trade, or in the business of common carriers, or which were, for other or similar reasons, contrary to public policy. The adjudications which have sustained contracts assailed on similar grounds are predicated on facts which remove each particular case from the operation of the rule, for the simple reason that "cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered." Oregon Steam Navigation Co. v. Winsor, 20 Wall. (U. S.), 64, 68.

Under our own system, the doctrine is not only sanctioned by judicial authority, but it has been specially incorporated in our Code, in its wide range of remedies for wrongs in enforcement of rights. Article 1893 Louisiana statutes and decisions. reads: "An obligation without a cause, or with a false or unlawful cause, can have no effect." Article 1895 provides: "The cause is unlawful when it is forbidden by law, when it is *contra bonos mores* [contrary to moral conduct], or to public order."

In the case of Association v. Berghaus, 13 La. Ann. 209, the principle was formulated thus: "Where a contract belongs to a class which is reprobated by public policy, it will be declared void, although in that particular instance no injury to the public may have resulted."

The case of association v. Kock, 14 La. Ann. 168, involved an attempt to judicially enforce one of the conditions of an association formed by dealers in bagging, who had agreed not to sell any bagging for the term of three months, without the consent of the majority of the members, under a stipulated penalty. In dismissing the action the court used the following language: "This is a case which ought never to have come before us. The agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of

primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice." See, also, *Glasscock v. Wells*, 23 La. Ann. 517; *Cummings v. Saux*, 30 La. Ann. 207.

Our ruling on this point is fortified in a double panoply, furnished by civil as well as common law authorities.

Plaintiff's counsel, however, make the point that, were they to concede, for the sake of argument, that the contract sued on might be against public policy, yet in so far as it has been executed, plaintiffs are entitled to recover. The argument is predicated mainly on the fact that from month to month, between November, 1884, and March, 1887, the defendant had executed its obligation under the contract by submitting reports of its earnings, by which it appeared that it was indebted to plaintiff in the sum of \$350,717.78, and that by pleading a peremptory exception the defendant admitted an additional indebtedness, on the same basis, of \$200,000. A proper understanding of the considerations which underlie our conclusions, herein previously announced affords a ready answer to this contention. The rule is that no effect can be given to a contract reprobated by law or contrary to public policy, and hence courts cannot lend their aid even to secure an otherwise fair division of the results of an illegal contract between the parties thereto.

In cases like the present, in refusing to enforce the stipulations of a contract which has the palpable tendency to stifle competition, or to create or foster a monopoly, courts will not go to the extent of decreeing the nullity of the contract sued on, but they simply abstain from dealing with it, or from discussing any of its effects as between the parties. On ascertaining that the building is infected with the disease of illegality, the judge simply refuses to enter its portals, and he retires without incurring contact with any of its inmates, and without attempting to examine into or to rectify any rights or wrongs which may exist between the inmates of the polluted household. He leaves them quietly where they have placed themselves, and he turns a deaf ear to any equity which one of the parties may invoke against the other. It is on this principle that by far the greater number of the decisions hereinabove quoted were grounded.

In the case of *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 25 Am. & Eng. Corp. Cas. 369, the court refused its aid to a party who claimed a stipulated commission for having negotiated a favorable contract for the gas company, on the ground that the contract was illegal. The court expounded the general principle as follows: "The rule of law is of uni-

versal operation that none shall, by the aid of a court of justice, obtain the fruits of an unlawful contract."

There is no conflict between the law of that case and the legal conclusions announced in the case of *Brooks v. Martin*, 2 Wall. 70, on which plaintiff's counsel mainly ground their hopes of success on this point. Brooks and Martin had formed a partnership for speculation in soldiers' land-warrants, which had been forbidden

*Brooks v.
Martin dis-
tinguished.*

by an act of congress. Brooks, who had the exclusive management of the firm's business, acting as the agent of his co-partner, subsequently bought out the latter's interest in the concern. To a suit brought by Martin to avoid the sale on the ground of fraud on the part of Brooks, the illegality of the original dealings of the firm was pleaded; but the court held that the illegality of the original contract was not a bar to Martin's recovery, as his claim did not involve the nature of said contract. The following clear distinction between a cause of action on the original contract and that on the rescission of a sale tainted with fraud is a fair answer to plaintiff's reliance on that case: "We have no doubt that the traffic was illegal. Undoubtedly, the main object of the act of February 11, 1847, was to protect the soldier against improvident contracts of the precise character of those developed in this record. * * * If a soldier who had thus sold his claim to Brooks, Field & Co., had refused to perform his contract, or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it, or given them any relief against him. And, if they had by any such means got possession of the land-warrant or scrip of a soldier, no court would have refused, in a proper suit, to compel them to deliver up such land-warrant or scrip to the soldier; or if Brooks, after signing the article of partnership, had said to Martin, 'I refuse to proceed with the partnership, because the purpose of it is illegal,' Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, 'I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance according to your agreement,' Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such refusal." This is precisely the legal attitude occupied by the parties in this controversy. In an illegal contract the defendant herein had agreed and covenanted to pay over to plaintiff any pool balance to which the latter was entitled, under the arrangement to divide their joint earnings in the traffic between El Paso and Galveston, and that between New Orleans and El Paso. It has acknowledged the exist-

ence of such a balance; but, when called on to deliver the same, it refuses, and sets up the illegality of the contract under which it was obtained. The answer of the court must be that plaintiff, urging a claim based exclusively on an illegal contract, is without remedy.

Having concluded that the contract sued on was illegal, as contrary to public policy, we see no necessity to discuss the two other grounds of exceptions set up by the defendant. Judgment affirmed.

Validity of Pooling Agreements Between Competing Lines.—See *Gulf, C. & S. F. R. Co. v. State (Tex.)*, 36 Am. & Eng. R. Cas. 481; and note, 488.
Monopoly—Whether Contract Tends to Create, is Question of Law and Fact.—*South Florida R. Co. v. Rhoads (Fla.)*, 37 Am. & Eng. R. Cas. 100.

RICHMOND & DANVILLE R. CO. *et al.*

v.

DURHAM & NORTHERN R. CO. *et al.*

(*North Carolina Supreme Court, December 9, 1889.*)

Connecting Railroads—Power to Make Connection—Condemnation or Previous Agreement.—The provision of section 1957, N. Car. Code, that, if railroad companies cannot agree as to the manner of connecting their lines, commissioners shall determine "the points and manner" of the physical connection which is sought to be made, the connection of two lines is wrongful if made without previous agreement or condemnation; and the company making the connection cannot justify it under a statute which permits an entry upon lands for the purpose of "constructing" a railroad, and bars recovery after the lapse of two years.

Same—Parol License—Valuable Improvements—Revocation.—Where a railroad company gives a parol permission to another company to enter its right of way to connect the tracks of the two companies, only a license is granted, which may be revoked at pleasure, although valuable improvements have been made on the faith of it.

APPEAL from Superior Court, Vance County.

The Oxford & Henderson Railroad Company was chartered on the 23d day of March, 1871. In the month of August 1881, it completed its track to a point in the town of Henderson designated as "A" in the diagram, within a few feet of the right of way of the Raleigh & Gaston Railroad

Company, and near which it erected a small depot. From the point, A, to the passenger depot of the Raleigh & Gaston Railroad Company the distance is about ———feet. For the purpose of making a physical connection with this latter road, the Oxford & Henderson Railroad Company, in 1881, through its lessee, A. H. A. Williams, entered upon the right of way of the Raleigh & Gaston Railroad Company, and was proceeding to lay its track longitudinally on the said right of way, in the direction of the latter's passenger depot, when it was met by an opposing force of the Raleigh & Gaston Railroad Company, which was building a track from the latter's passenger depot in the direction of the point, A. The Raleigh & Gaston Railroad Company forbade the lessee, Williams, from entering or further trespassing, as it alleged, upon its right of way. A breach of the peace between the opposing forces being imminent, warrants were issued at the instance of the Raleigh & Gaston Railroad Company against Williams and some of his employes, under which they were arrested and bound over to court. The said lessee was not enjoined against further proceeding with his track, but desisted, he says, in order to prevent bloodshed and the loss of life. That when the work was thus interrupted the said lessee had extended the track on the said right of way to a point marked "B" on the diagram, some ——— feet from the point A, and it is alleged that it continued in possession of the same until the present time. It does not distinctly appear to what extent this track was used, but it was never removed, and appears to have been in the possession and under the control of the said lessee. In 1884 the lessee, Williams, extended his track along said right of way to the point, C, in the diagram, where it was joined to "a short spur track of the Raleigh & Gaston Railroad Company, which led to the latter's depot, and the whole extension from A to the said depot has been used ever since by the Oxford & Henderson road, both under the lessee, Williams, and his lessee, the Richmond & Danville Railroad Company. This extension of the track from B to C and the use of the track from C to the depot, was made and permitted under a parol agreement, the terms of which are seriously disputed by the contending parties.

The Oxford & Henderson Company on this point alleges that subsequent to the extension of the track to B, "the Raleigh & Gaston Company (in 1884), finding that it suffered much delay to its trains in stopping to transfer freight to the Oxford & Henderson Railroad Company, suggested to James A. White (the superintendent) that he could extend his track a short distance further, so five or six cars could be left along-

side it by the Raleigh & Gaston Railroad Company. Thus transfer of heavy goods could be easily facilitated; and complainants are informed and believe that the said extension was made to the point marked 'C' by the Oxford & Henderson Railroad Company under this suggestion, and with the acquiescence of the Raleigh & Gaston Railroad Company. That, subsequent to this, John C. Winder (general manager) suggested and proposed to said White, as plaintiffs are informed and believe, that if the Oxford & Henderson Railroad Company would agree to receive the cars of the Raleigh & Gaston Company on its track without transfer of freight, and would not require the Raleigh & Gaston Company to stop its passenger trains at the depot of the Oxford & Henderson Railroad Company, as said company had a right to require under the statutes of the state, that the Raleigh & Gaston Railroad Company would consent that the Oxford & Henderson Company would make a physical connection with its track near the Raleigh & Gaston Railroad depot, by joining the Oxford & Henderson extension track to a short spur track which the Raleigh & Gaston Railroad Company had put in at that point, and this proposition was accepted and agreed to by the Oxford & Henderson Railroad Company, and the track was accordingly again extended and connected with the said spur track, and the physical junction of the two tracks completed."

The contention of the Raleigh & Gaston Company on this question is thus set out in its answer: "That in the spring of 1884 the said Williams, lessee of the Oxford & Henderson road, was allowed to extend his track over this land, and to make a physical connection with the track of the Raleigh & Gaston road, upon the express condition, stipulation and agreement that the entire track laid by him on the right of way of the Raleigh & Gaston road should be taken up, the connection severed, and the right of way restored, whenever the Raleigh & Gaston Company should require this to be done, and that the said Williams expressly agreed to those provisions, and the track was accordingly extended, and the connection made, the Raleigh & Gaston Company making no charge for the same."

The plaintiffs allege that the Raleigh & Gaston Company has threatened to tear up the whole of said track, by which they will be irreparably damaged, and they pray for a perpetual injunction. The alleged threat is contained in the following letter from J. C. Winder, the general manager of the Raleigh & Gaston, to W. H. Greene, general superintendent of the Richmond & Danville: "Dear Sir: I had hoped before this that you would have removed your track,

now upon the right of way of the Raleigh & Gaston Railroad at Henderson, which I notified you some days ago had been condemned by the Durham & Northern Railroad Company for its use. As nothing has yet been done towards the removal of your track, I write now to say that, as the right of way is absolutely necessary for our use, if your track is not removed within the next ten days I will take it up and place your ties and rails at as convenient a place for you as it is possible for me to do." The Durham & Northern Company mentioned in the foregoing letter has had the right of way of the Raleigh & Gaston, over which the track of the plaintiff is laid, condemned to its use as a part of its main line. No notice of the proceedings was served on the plaintiffs, and they allege that they were collusive and void. The plaintiffs claim the right of way in question: "(1) By a continued possession for more than two years after the road had been 'located,' which is the provision of the Western North Carolina Railroad charter, or two years after the road was 'finished,' which is the provision of the North Carolina Railroad charter; because the Oxford & Henderson road has the same privileges or immunities possessed or enjoyed by any other railroad in this state. (2) The plaintiff also claims the right to build this track 'to join or unite' with the Raleigh & Gaston track. (3) The plaintiff also claims by estoppel against the defendants, who acquiesced in the possession, and gave consent to continue the track for its convenience and advantage.

There were many affidavits read on both sides, which were more or less conflicting, especially as to whether the extension of the track was permitted upon an agreement that it should be removed upon the request of the Raleigh & Gaston Company. As the court has found it unnecessary to pass upon the affidavits, they are not essential to a proper understanding of the opinion. His honor below granted a restraining order, and it is from this order that the defendants appeal.

Batchelor & Devereux and *J. W. Hinsdale* for appellants.

D. Schenck, Busbee & Busbee, and *Graham & Winston* for appellees.

SHEPHERD, J.—The first two grounds upon which the plaintiffs base their right to the location in question are, to use their own language, as follows: "(1) By a continued possession of more than two years after the road had been 'located,' which is the provision of the Western North Carolina Railroad charter, or two years after the road was 'finished,' which is the provision of the North Carolina Railroad charter; because the Oxford & Henderson road has the same privileges or im-

munities possessed or enjoyed by any other railroad in this state. (2) The plaintiffs also claim the right to build this track 'to join or unite' with the Raleigh & Gaston Railroad track."

The Oxford & Henderson Railroad Company was chartered by the general assembly of 1870-71. Its charter gave it the power "to have land condemned for right of way according to existing laws." Under the existing laws there was no such statute of limitations as is relied upon by the plaintiffs. They must therefore, in order to sustain their contention, connect themselves with the charters of the Western North Carolina and the North Carolina Railroad Companies. These charters confer upon the said companies the right to enter upon any land "for the purpose of constructing" their roads; "and if for want of agreement as to the value thereof, or for any other cause, the same cannot be purchased from the owner or owners, the same may be taken at a valuation to be made by five commissioners," etc. If there be no agreement or purchase, there shall be a presumption of a grant of an easement, "and, in case the owner or owners * * * shall not apply within two years next after" the road is "finished" over his or their lands, or in the case of the Western North Carolina Road within two years after the road has been "located," then the owner or owners "shall be forever barred from recovering said land, or having any assessment or compensation therefor." In order to avail themselves of this limitation, the plaintiffs rely upon an amendment to the charter of the Oxford & Henderson Railroad Company, (chap. 188, Acts 1879,) which provides that it "shall have all the powers and enjoy all the privileges and immunities possessed or enjoyed by any other railroad in the state." These amendatory words, standing alone, would undoubtedly be sufficient to serve this purpose, but the act further provides that "this act shall not apply to Henderson township." The scene of this controversy being in Henderson township, it must follow that the statute of limitations in question has no application to this case.

Conceding, however, that the two years' limitation applies to this controversy, and that entries for the purpose of constructing a railroad may be made before the institution of proceedings for condemnation, we will inquire whether the above mentioned charters or the general laws authorize an entry upon the right of way of another railroad, where there have been no such proceedings, and where the sole object of such entry is to make a physical connection with such road. It is well settled in this state that the right of way of one road may be appropriated in part to the use of another. North

Right to enter
upon right of
way without
condemnation.

Carolina R. Co. v. Central Carolina R. Co., 83 N. Car. 489. We think that whenever there is a right to enter upon the lands of a private person, before condemnation proceedings, for the construction of a road, a like right may be exercised upon that part of a right of way which is not in actual use; subject, however, to the restraining power of the court, which will determine whether such right of way is necessary, and should be thus appropriated. When land is taken for the purpose of constructing a railroad, all that the commissioners, in condemnation proceedings, are required to do is to fix the amount of compensation which should be made to the owner. But where land is taken under § 1957, par. 6, Code, the commissioners are not only to fix the amount of compensation, but they must determine, in the event of disagreement, "the points and manner" of the physical connection which is sought to be made. This distinction finds support in *Carolina Cent. R. Co. v. Love*, 81 N. Car. 434. We are of the opinion that the settlement of these important questions is a condition precedent to the right of entry. To hold otherwise would encourage the very troubles of which this case furnished such a signal example. It could never have been intended that the depots and side tracks of a railroad company should be subjected to the invasion of another road, which could run its track according to its own will or caprice, and seriously interfere with the transaction of its business, as well as the convenience of the public. We think that the above section of the Code was enacted for the very purpose of avoiding such unseemly conflicts, and that the best interest of all concerned will be subserved by requiring a strict adherence to its provisions.

It may be argued that such harmful results may be prevented by injunction. This is open to the objection that much injury may be done, and even the peace of the state may be violated, (as was apprehended in the present case,) before this remedy could be obtained. It may also be observed that, if the court is to determine the location upon injunction proceedings, it would be practically abrogating the statutory tribunal of "three disinterested and competent freeholders," which has been instituted for the very purpose of settling such disputed question. We are not unmindful of the case of *North Carolina R. Co. v. Carolina Central R. Co.*, 83 N. Car. 489. In that case, proceedings for condemnation had been instituted before entry, but, before the clerk of the court had acted, the defendant entered and commenced to work. The plaintiffs sought to enjoin the defendants, and the judge found all the facts necessary for the court to see that the plaintiffs had no equity. The clerk afterwards appointed commission-

ers, from which action the plaintiff appealed, and both appeals seem to have been heard together in this court. By reference to the opinion, it will appear that some stress was laid upon the pendency of the proceedings for condemnation, and it is suggested that they might be a barrier to the prosecution of the suit for injunction. It is also suggested that the facts did not present a case of irreparable damage. The opinion then discusses the merits of the controversy, so far as they could be properly considered at that "preliminary stage of the case," stating that "the main, if not the only, important questions" argued were whether the defendant had "a right to proceed for the condemnation of lands for its use," or whether its power for that purpose had been exhausted, and whether the right of way "was liable under the law of eminent domain to be taken for the use of the defendant company." The court then proceeded to discuss these questions; and the point, whether the land was subject to entry before any proceedings whatever were commenced, for the purpose of making a physical connection, was not directly passed upon, nor does it seem that the attention of the court was directed to the section of the Code now under consideration. We cannot therefore, regard that decision as authority upon the particular question here presented. In the present case the Oxford & Henderson Railroad Company alleges that it had completed its track from Oxford to Henderson, to the point marked "A" in the diagram, (which was within a few feet of the right of way of the Raleigh & Gaston Railroad,) and "that, while preparing to extend its track over said strip of land, (the said right of way,) to a point on the Raleigh & Gaston Railroad track, in order to make an intersection and junction therewith, as it was allowed to do by the statute laws of North Carolina, it was forbidden to proceed any further by the officers of the Raleigh & Gaston Railroad Company." It thus plainly appears that the use of the land was not required for the completion of the road to the terminus, Henderson, but to make a connection under § 1957 of the Code. This is the avowed purpose of the entry, and, as there was no agreement or condemnation proceedings, it was unlawful, and the possession under such an entry would not be protected by the limitations of the charters mentioned, even if such charters were plainly applicable to this case. Thus have we discussed this branch of the plaintiffs' contention in every aspect presented by them, and our conclusion is that the Oxford & Henderson Railroad Company and its lessee, the Richmond & Danville Railroad Company, have no title to the location in question by reason of their entry and alleged adverse possession.

We will now consider the third ground relied upon by the

plaintiffs, which they say, in their brief, is "the safest basis" upon which "to ground its equity for an injunction." "(3) The plaintiffs also claim by estoppel against the defendants, who acquiesced in the possession, and gave consent to continue the track for its convenience and advantage." As we propose to base our decision upon the admitted facts, we will exclude from our consideration the contention of the defendants that the track was extended from the point, B, to C, under an agreement that it was to be removed at the request of the Raleigh & Gaston Railroad Company. We then have the following case: The Oxford & Henderson Railroad Company, under a parol agreement, extended its track in 1884 to the point, C. The Raleigh & Gaston Railroad Company has notified it to remove the same, and, the plaintiffs having failed to comply with this request, the said Raleigh & Gaston Railroad Company is about to take up the said track, and place "the ties and rails at as convenient a place [for the plaintiffs] as it is possible for it to do." This is the threatened injury complained of. There is no pretense that there was any agreement to grant an easement, and the most that can be said is that the extension was made under a parol license, and that valuable improvements have been made. The plaintiffs rely chiefly upon the case of Railroad Co. v. Battle, 66 N. C. 546. That case was materially different from ours. The defendant, Battle, had executed to the plaintiff a writing which the court said could be specifically enforced so as to create an easement. It was "not [says the opinion] a mere license. It was given for a valuable consideration, and was coupled with an interest. It is true that at law no easement passed to the company, for an easement in land can be created only under seal. But the writing by which the defendant charged himself was binding, within the statute of frauds. It was a contract which, as has heretofore been said, this court would specifically enforce." In these few words we find the *ratio decidendi* of the case. The case of Rerick v. Kern, 14 S. & R. (Pa.), 267, cited in the opinion in Battle's Case, is from Pennsylvania, where the doctrine of part performance obtains, and is not good authority here, where that doctrine has long since been repudiated. The quotation from that case was unnecessary, and the principles there enunciated, as to the binding effect of an executed parol license, are unquestionably opposed to the decisions of this court, as well as the general current of authority. The doctrine of the early cases, which converted an executed license into an easement, is now generally discarded, as being in the teeth of the statute of frauds. The cases of Ricker v. Kelly, 1 Me. 117, and Clement v. Durgin, 5 Me. 9, cited by

Revocation of
license.

defendants' counsel, have now little following; and the case of *Rerick v. Kern*, 14 S. & R. (Pa.), 267, also relied on, which was an action at law for damages in favor of the licensee, is followed in but few states. *Houghtaling v. Houghtaling*, 5 Barb. (N. Y.), 383; *Jamieson v. Millemann*, 3 Duer. (N. Y.), 255; Washb. Easem. 24. A simple reference to some of the more important cases, in support of the views herein expressed, will suffice. *Cook v. Stearns*, 11 Mass. 533; *Mumford v. Whitney*, 15 Wend. (N. Y.), 380; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.), 72; *Foot v. Northampton Co.*, 23 Conn. 214; *Bridges v. Purcell*, 1 Dev. & B. (N. Car.), 492; *Hazelton v. Putnam*, 3 Pin. (Wis.), 107; *Woodward v. Seely*, 11 Ill. 157; *Wood v. Leadbitter*, 13 Mees. & W. 838; *Wiseman v. Lucksinger*, 84 N. Y. 31.

In cases where the license is connected, with a valid grant, as of chattels or fixtures, upon the land of the licensor, susceptible of being removed, it is subsidiary to the right of property, and irrevocable to the extent necessary to protect the licensee, and save to him the right of entry; the right of possession following the right of property. *Nettleton v. Sikes*, 8 Metc. (Mass.), 34; *Heath v. Randall*, 4 Cush. (Mass.), 195; *Wood v. Leadbitter*, *supra*. But, where it is sought to couple a license, a parol grant of an interest in the realty, the attempted grant being void, the transaction remains a mere license. *Wood v. Leadbitter*, *supra*; *Johnson v. Skillman*, 29 Minn. 95. The following words from *Wood v. Leadbitter*, *supra*, cited, in *Battle's Case*, declare, we think, the true principle: "But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license. It is not an incident to a valid grant, and it is therefore revocable. The same rule prevails in courts of equity, with this difference; that whereas the courts of law require the grant to which the license is incident to be one valid at law, a court of equity only requires that it shall be one that is regarded as a valid grant in that court." In our case there is, as we have said, no attempt to grant an easement, and the question is whether a parol license which has been acted upon, and the enjoyment of which necessarily involves expenditure in the way of improvements, can be revoked at the will of the licensor. This is expressly decided in the affirmative in *Kivett v. McKeithan*, 90 N. Car. 106. The plaintiff in that case, with the verbal consent of the defendant, built his mill-dam on the defendant's land. After the mill had been in operation for several years, the defendant revoked the license, and notified the plaintiff to remove the dam, which he declined to do, and the defendant himself tore it down.

The plaintiff sued him for the alleged trespass, and relied upon the license, and the fact that in pursuance thereof he had built his mill-dam and expended money. The court, however, held that a parol license relating to land, whether voluntary or supported by a valuable consideration, may be revoked by the owner without incurring liability in damages. In speaking of the doctrine of equitable estoppel, which is invoked in this case, the court says: "In answer to a suggestion of bad faith in the defendant in inviting the expenditure, and then depriving the plaintiff of its fruits, we must say: All this is done with full knowledge of the law, that the permission may be recalled, and it is the plaintiff's folly, and the result of misplaced confidence in its continuance, for which the law makes no provision. The plaintiff could have guarded against the loss by purchasing and taking a conveyance of the easement from the defendant, or, if this could not be done, by pursuing the remedy pointed out in the statute. Code, § 1849, 'For the Condemnation and Appropriation of Lands.'"

It is needless for us to cite and review the many conflicting decisions upon the subject in other states, as this court has emphatically put at rest, with us at least, all doubt upon the question. As the doctrine is so well stated in *Kivett v. McKeithan*, *supra*, and *McCracken v. McCracken*, 88 N. Car. 272, we think it proper, in view of the importance of this case, to reproduce a part of the language of the opinions in those cases. In *Kivett's Case* the late chief justice says: "The cases in which it has been held that a license acted on and expenditures made upon the faith of its continuance, when founded on a valuable consideration, vests an interest beyond the power of revocation, at the will of the owner who gives it, proceed upon the same considerations and reasoning which support the doctrine of part performance, and these are that the statute will not countenance an attempted fraud, and render it successful. Many of them will be found collected in the notes of the learned and discriminating editor of the *American Decisions* appended to *Ricker v. Kelly*, vol. 10, p. 40; *Rerick v. Kern*, vol. 16, p. 501; and *Mumford v. Whitney*, vol. 30, p. 71. But the subject of a parol contract, under which improvements in good faith have been put upon land, and the relative resultant interests and rights to and between the parties to it, has been so fully considered in the recent case of *McCracken v. McCracken*, 88 N. Car. 272, that little remains but to announce the conclusion there arrived at. The court there used this language (RUFFIN, J.): 'If we consider the contract as a license between the parties—as a license given to the plaintiff to enter upon the land, and erect and enjoy the improvements—we cannot perceive that it in the

least serves to help his case. If purely a license, it excused, it is true, his entry upon the land, which otherwise would have been a trespass. But it was still revocable, and its continuance entirely dependent upon the will of the owner. If intended to pass a more permanent and continuing right in the land, whereby the authority or estate of the owner could be in the least impaired, it was then not only necessary to be evidenced by writing, but could only be made effectual by deed."

In view of the reasons given and the authorities cited, we are constrained to hold that the Oxford & Henderson Railroad has acquired no interest in the right of way in question. This being our conclusion, it necessarily follows that the said company cannot impeach the proceedings under which the said right of way was condemned to the use of the Durham & Northern Railroad.

In *Marshall v. Stanly Co. Com'rs*, 89 N. C. 106, it is said that where the relief sought is the object of the action, and not merely auxiliary, the injunction should be continued until the hearing; but this rule only applies where it is possible that the plaintiff may be entitled to the relief demanded, and as we are of the opinion that, upon the pleadings and the admitted facts, the plaintiffs are not entitled to such relief, it would be useless to continue the injunction until the final hearing. The late distinguished chief justice concurred in this disposition of the case.

The plaintiffs moved in this court to file additional affidavits. After mature consideration, we decline to grant the motion, and we have therefore decided the case upon the testimony which was heard by his honor below. If, as the plaintiffs suggest, they have newly discovered testimony, tending to show the grant of an easement, valid either at law or in equity, they may still avail themselves of it, either by amendment in the court below, or by a new action; but no restraining order should be granted unless a *prima facie* case is presented in strict conformity with the principles which we have declared in this opinion.

Much trouble and litigation would have been avoided had the Oxford & Henderson Railroad Company obtained a grant of an easement, or, failing to do so, pursued the legal remedy provided in § 1957 of the Code. It may not be improper to observe that this provision of the Code is mandatory, and was not intended for the benefit of railroad companies alone. Extraordinary privileges are granted such corporations, and it has been well settled by the Granger Cases, 94 U. S. 113 *et seq.*, that, "when private property is devoted to a public use, it is subject to public regulations." Accordingly, it has been

provided that railroads shall "unite * * * in forming connections," and, if they cannot agree, commissioners are to be appointed to determine the "points and manner" of making the same. It is very clear that the purpose of this legislation was to promote the convenience of the public, and this paramount object should not be defeated by dissensions and conflicts of rival corporations. There is error. Let this opinion be certified to the superior court, to the end that the injunction be dissolved.

Revocation of License to Enter Lands and Construct Road.—See *Campbell v. Indianapolis & V. R. Co. (Ind.)*, 30 Am. & Eng. R. Cas. 303, note, 307.

CHICAGO, KANSAS & WESTERN R. CO.

v.

WATKINS.

(*Kansas Supreme Court, January 11, 1890.*)

Trespass by Contractor—Liability of Railroad Company.—Where a railway company directs and procures a trespass to be committed by a contractor and his employes constructing its roadbed, it is liable with those who committed it.

Right to Enter Lands—Prepayment of Compensation.—Until the payment of the condemnation money or its deposit as required by law, a railway corporation obtains no right to the land attempted to be appropriated excepting a right to make a survey.

Trespass—Measure of Damages—Instruction.—Where a party in a civil action tried before a jury requests the court to instruct as to the measure of damages, and the court gives the instruction prayed for, and the jury in their special findings show that the verdict against the defendant embraces only such damages as are included in the instruction requested, *held*, that such party cannot complain that the instruction is erroneous.

Trespass—Assessment of Treble Damages.—Where treble damages are recoverable in the district court in a civil action under the trespass act, they ought to be assessed by the jury under proper instructions from the court.

ERROR from District Court, Lincoln County.

On the 11th day of August, 1887, J. B. Watkins commenced his action against the Chicago, Kansas & Western Railroad Company, and alleged in his petition: "That the said defendant is now, and at the times hereinafter mentioned was, a

corporation duly organized and existing under and by virtue of the laws of the state of Kansas. That said plaintiff is now, and for more than one year last past has been, the owner in fee and in the possession of the premises described as follows, to-wit: The west half of section No. three, (3) town No. (10,) range No. eight, (8,) in Lincoln county, Kan., containing 320 acres, more or less. That said land is improved and tillable, and is used and occupied as a single tract for agricultural and stock purposes. That on or about the 1st of June, 1887, and at various times subsequent thereto, and prior to the commencement of this action, the said defendant, with divers irresponsible persons in its employ, unlawfully and with force broke into and entered upon the premises of plaintiff as above described, and then and there broke down the fences then being on said premises, and with horses, wagons, and scrapers entered upon said premises, and trod down the grass, and cut and destroyed and converted to its own use the corn then and there growing on said premises,—all to plaintiff's damages in the sum of \$50, and for which plaintiff asks treble damages. And then and there cut down and destroyed on said premises a grove of one hundred ash trees, of the value of \$500, and carried away and converted the same to its own use, for which plaintiff asks treble damages. And then and there made an excavation across said premises two hundred feet in width, removing the soil, clay, and stones from about ten acres of land, and converted the same to their own use, to plaintiff's damages in the sum of \$500, for which plaintiff asks treble damages. And then and there constructed across the south half of said premises a fill or grade of dirt and stone about eight feet in height above the level of the surrounding land, with deep cuts and ditches on either side thereof. That plaintiff's residence and farm buildings have been and are cut off by cuts and ditches and embankments from the greater portion of said premises, and that he has been damaged by the construction thereof in the sum of \$1,000. That said defendant wrongfully entered upon said premises as aforesaid, without the knowledge or consent of this plaintiff, and without having taken any steps, by condemnation or other legal proceedings, to appropriate or acquire any rights to any part of said premises. Wherefore plaintiff asks judgment against said defendant in the sum of \$4,600, and for costs of this action."

Subsequently the defendant filed an amended answer, alleging: "That for a first defense to the alleged cause of action contained in said petition, that said defendant denies each and every allegation and averment contained in said petition, and each and every part thereof. For a second defense to

said alleged cause of action said defendant says: That said defendant now is, and has been during the time for more than one year last past, a railway corporation duly chartered and organized under and by virtue of the laws of the state of Kansas, and defendant was so chartered and organized for the purpose of constructing and operating railroads in said state. That during the months of January and February of this year said defendant surveyed and located a route for one of its proposed railroads through the counties of Chase, Morris, Dickinson, Ottawa, and Lincoln, in said state, and that said route passed over and across a part of the lands described in said petition. That on or about the 12th day of February, 1887, the honorable S. O. Hinds, judge of the above named court, upon an application duly made to him by the defendant, appointed three commissioners, each a resident and freeholder of said county of Lincoln, to lay off said route, side tracks, etc., through such county, and of such width and upon such location as might be desired by said defendant, having the same carefully surveyed, and ascertaining carefully the quantity of land necessary for such proposed route, side tracks, etc., out of each quarter section or other tract of land through which said route, side tracks, etc., were located, and appraise the value of the portion taken out of each quarter section or other lot of land, and assess the damages to the remainder thereof. That on the 17th day of February, 1887, said commissioners were duly sworn to honestly and faithfully discharge their duties as such commissioners. That said application for the appointment of said commissioners, their appointment, and oath of office were duly made and taken under article nine of chapter twenty-three of the Compiled Laws of Kansas. That, before having said commissioners proceed with their work in condemning said route through said county of Lincoln, said defendant desired to purchase as much as possible of the right of way along said route, and for that purpose employed men to negotiate with and purchase said right of way from the owners and those interested in the real estate along said route. That said defendant, and the men employed by it as aforesaid, during the month of July, 1887, negotiated with said plaintiff for the purchase of the right of way for its said proposed railroad through the lands described in said petition, and as a result of such negotiations said plaintiff and defendant agreed upon the amount of compensation that plaintiff should receive of defendant for said right of way through said lands, on account of said plaintiff's interest therein; and said plaintiff then contracted with said defendant to permit defendant to retain its roadbed and right of way over said lands, and along said route, and

to receive said compensation in full payment for plaintiff's interest in the value of said lands so taken, and the damages to the remainder thereof, and that said negotiations, agreement and contract were had and made after work was done on the grading of said roadbed on said route through said lands. That said agreement was verbal. That, whatever part of said lands has been injured or appropriated by defendant, such appropriation and injury have been occasioned by the construction and grading of said roadbed on said route, and such construction and grading were ratified by plaintiff under said agreement and contract. That on or about the 4th day of August, 1887, said commissioners performed their duties, and filed their report in the office of the county clerk of said county, and defendant did not have said commissioners condemn said right of way through said lands, for the reason that it relied upon said contract and agreement, and the performance thereof by the parties thereto; but defendant has fully completed the condemnation proceedings embraced in said report, and has paid the amount of damages therein awarded. That during said year, and before the defendant had constructed any part of its roadbed for said railroad, in said county of Lincoln, it made a map and profile of said route through said county, and filed the same in the office of the county clerk of said county. Wherefore said defendant prays judgment for costs herein." To this answer the plaintiff filed a general denial.

Trial had at the November term of the court for 1887, before the court with a jury. The jury returned a verdict for the plaintiff, and assessed his damages at \$345.50. They also returned the following special findings of fact: "Question. Did the defendant cut any timber on the premises of plaintiff, without his consent? Answer. Yes. Q. If you answer the previous question in the affirmative, what was the value of that timber to those premises? A. \$15. Q. Did the defendant, through its contractors, enter upon the premises of plaintiff without his consent, and dig up any clay or loam? A. Yes. Q. If you answer the last question in the affirmative, state how much such clay or loam was worth. A. \$30 per acre. Q. Does it appear from the evidence that the damage in controversy herein to the lands described in plaintiff's petition, to-wit, the west half of section three, (3,) in township ten, (10,) range eight (8), west, in Lincoln county, Kan., were occasioned in the construction by defendant of its railroad described in its amended petition? A. Yes. Q. Did the said defendant, in the construction of its said railroad through said lands, damage any of the improvements thereon? If so, describe such improvements, and state the amount of damage

to each of such improvements. A. ———. Q. Did the defendant, in the construction of its said railroad through said lands, injure any of the fences thereon? If so, what was the actual damage to the fences so injured, at the time they were so injured? A. Yes. No evidence as to the amount of damages. Q. Did the defendant, in the construction of its railroad through said lands, destroy any of the fences thereon? If so, what was the actual value of the fences at the time they were so destroyed? A. Yes. No evidence as to the amount of damages. Q. Did the defendant, in the construction of its said railroad through said lands, tread down any of plaintiff's grass then growing upon said lands? If so, what was the actual value of said grass at the time it was trodden down? A. Yes. \$0.50. Q. Did the said defendant, in the construction of its said railroad through said lands, cut and destroy any corn owned by the plaintiff, and growing thereon? If so, what was the actual value of the corn at the time it was so cut and destroyed? A. No. Q. Did the defendant, in the construction of its said railroad, cut down, destroy, carry away, and convert to its own use any of the ash and other trees then growing on said lands? If so, what was the actual value of said trees at the time they were so cut down, destroyed, carried away, and converted to said defendant's use? A. Yes. \$15. Q. How many acres of land did the defendant take and appropriate in the construction of its railroad through said lands? A. About five acres. Q. In the construction by the defendant of its said railroad through said lands, from how many acres of such land did it actually remove the soil, clay or stone? A. About two acres. Q. Did the defendant, in the construction of its railroad bed for said railroad through said lands, remove off from the entire tract any of the soil, clay, or stone of which said lands were composed? A. No. Q. How many cubic yards of earth are there in said roadbed of the defendant on said land? A. 4,500. 2. What is it worth per cubic yard to remove the earth composing said roadbed on said lands, back to the ditches from which it was taken in the making of said roadbed? A. 7 cents per cubic yard. Q. Do you, in your general verdict, allow the plaintiff any damages to said land by reason of the construction of said roadbed for said railroad thereon, except the cost of removing said roadbed back to the ditches from which it was taken? If so, how much? A. Yes. \$30.50. Q. If the last question is answered in the affirmative, then the jury will answer the following question: For what injury to said lands is the amount of damages set forth in the last answer above allowed? A. Trees, \$15; damages to cultivated land, \$15; grass, 50 cents. Q. Did the defendant, in

the construction of its said roadbed for said railroad, remove any of the clay on said land? If so, how many yards of clay was so removed? A. 50 yards. Q. What was the actual value of the clay so removed, at the time of such removal, in the construction by said defendant of its said roadbed for said railroad on said lands? A. \$30 per acre. Q. Did the defendant in the construction of its said roadbed for said railroad, remove any of the stone on said land? If so, how many cubic yards of stone was so removed? A. No. Q. What was the actual value of the stone so removed, at the time of such removal, in the construction by defendant of its said roadbed for said railroad on said lands? A. Nothing. Q. In the construction by the defendant of its said roadbed for its said railroad through said land, how many feet of land did it appropriate on each side of the center line of said roadbed? A. 45 feet. Q. Has the defendant laid any ties or iron on its said roadbed on said land? A. No. Q. How many acres of land are there included in the ditches made by said defendant in the construction of its said roadbed on said lands? A. About two acres. Q. How many acres of land are there included in the inner lines of said ditches on said lands? A. Three acres, or thereabout." The court rendered judgment for \$376.50, increasing the amount of the judgment by giving treble damages for the trees and grass in controversy. The railroad company filed its motion for a new trial, which was overruled. It excepted, and brings the case here.

Geo. R. Peck, A. A. Hurd, and R. F. Thompson for plaintiff in error.

W. J. Patterson and M. Summerfield for defendant in error.

HORTON, C. J.—This was an action brought by J. B. Watkins against the Chicago, Kansas & Western Railroad Company to recover damages for trespass on real estate, committed in July, 1887. The land was owned by Watkins, but at the time of the trespass Monroe Smith was in the actual possession of the land, and entitled to the crops of tenant. It is claimed by the railway company that it is not responsible for the trespass, it having shown that the grade, the cutting down of trees, etc., was done by contractors having charge of the construction of its road. It appears, however, from the evidence and the admissions of the railway company upon the trial, that the contractors were set to work by the agents of the company to clear the right of way and construct its roadbed. Therefore it is liable, as it caused and directed the work. Whether the axe be used by himself, by his employe, his vendee, or one occupying no contract relation to him is immaterial, for he cuts the

Liability for
trespass.

trees who causes them to be cut. *Welsh v. Cooper*, 8 Pa. St. 217; *Fox v. Northern Liberties*, 3 Watts & S. (Pa.) 103. In the latter case, it was said that a municipal corporation could become a trespasser by previously authorizing or subsequently ratifying the trespass of its officer. It is an elementary rule that he who procures a trespass to be committed is liable with those who committed it, and it has been often recognized in our cases. There is no hardship involved in the application of the rule to this case, for in good conscience the corporation should bear the consequences of an act which it caused or procured to be done. The contractors and the laborers who cleared off the right of way, cut down the trees, and constructed the grade, had no interest in the matter beyond the pay for their work, and they did what the railway company directed. This case is wholly different from *Kansas Cent. R. Co. v. Fitzsimmons*, 18 Kan. 34. In that case the contractors had sole control of the turn-table, which they negligently left without guard or lock. The railway company was not responsible for the negligence of the contractors, because in no way a party to it.

It is next claimed that the jury was not properly instructed as to the measure of damages, and that it was error to instruct the jury to consider the difference in value of the land before and after the grade. As the case is now presented, it is unnecessary to decide the particular question argued in the brief of the railroad company, as to what damage is allowable in an action of trespass, where it appears upon the trial there is permanent injury or a permanent use. The railroad company, in this case, relied upon a license or contract given by Watkins under which the acts complained of were done, but the fact whether there was such a contract was submitted to the jury upon conflicting testimony, and the jury found against the company. The verdict disposes of that question.

Measure of damages.

There was no showing upon the trial that any right of way was obtained through the land by a deposit of condemnation money. Until the money is paid or deposited, the company obtains no right to the land condemned, unless it is the right to make its survey. It was not shown upon the trial that any ties or rails had been laid upon the right of way, or that any railroad was in operation. Therefore the condemnation proceedings cut no figure in the case. *Missouri, K. & T. R. Co. v. Ward*, 10 Kan. 352. In that case it was said: 'In this state a corporation does not obtain a right of way for a railroad by appropriation until full compensation therefor be first made in money or secured by a deposit of money to the owner; and, if it builds its road

Right to enter lands.

over the land of a person without first obtaining the owner's consent or the right of way, it is a trespasser, and liable as such."

Again, the railway company asked the court to instruct the jury: "If you find from the evidence that the defendant did, about the time set forth in the petition and before the commencement of this action, enter upon the premises of plaintiff, and construct a grade thereon, then the plaintiff is entitled, as his damages in this action against the defendant for the erection of such grades, to the amount that it will actually cost to remove the grade back to the ditches from which it was taken, together with any other damages that may accrue to the land comprising the ditches and included within them." The court charged substantially as requested, and, while it also charged the jury to take into consideration the difference between the value of the land before and after the grade was constructed, the jury, by their special findings, limited the damages (with a single exception, to be noted hereafter) within the instruction prayed for. They found there were 4,500 yards of dirt in the grade or embankment, and that it would be worth seven cents per yards to level it down, making \$315. They found the value of the trees destroyed to be \$15; the damage to the cultivated land by the grade, \$15; and damage to grass, 50 cents,—making the verdict \$345.50. The trial court trebled the damages for the trees and grass, and rendered judgment for \$376.50. The damage to the grass of 50 cents, and the treble damages allowed, cannot be sustained. Monroe Smith was the tenant in the actual possession of the land, and he is the person entitled to recover damages, if any, for the crops, including growing grass. 3 Suth. Dam. 365; *Arn v. Matthews*, 39 Kan. 272. It appears from the testimony that Smith was paid for the crops on the right of way. When treble damages are recoverable they ought to be assessed by the jury, under proper instructions. The jury are to give all damages authorized by the statute. Sections 285-288, Civil Code; sections 1, 2, chap. 113, Comp. Laws 1885. The judgment of the trial court must be corrected by deducting the 50 cents allowed for grass, and the treble damages given by the court for the trees, etc. The case will be remanded, with direction to modify the judgment accordingly; all the justices concurring.

Liability of Railroad Companies for Trespasses by Contractors and Others.—See *Wattmeyer v. Wisconsin R. Co.*, (Iowa), 30 Am. & Eng. R. Cas. 384; *Topp v. West Shore & O. T. Co.* (N. J.), 19 *Id.* 7.

APPEAL OF PATTERSON.

(Pennsylvania Supreme Court, November 4, 1889.)

Preliminary Injunction—Dissolution—Construction of Railroad.—Where plaintiff's title is not established at law, or is not clear, but is questioned on the very ground on which he puts it, and he has never been in the possession of the lands, a preliminary injunction restraining the construction of a railroad across the lands will be dissolved.

Injunction—Obstruction of River—Irreparable Injury.—When it appears that a railroad company is only cutting into the rough banks of a river and erecting a solid wall to protect the banks; that the dirt thrown into the river is from the excavations made for the wall; that it will be thrown back as filling; and that the wall when constructed will draw the water to itself and increase the flow instead of impeding it, or deflecting it upon plaintiff's lands, an injunction restraining the company will not be granted on the ground that its acts will cause irreparable injury.

APPEAL from Court of Common Pleas, Lackawanna County.

Bill at the instance of Roswell P. Patterson to enjoin the Scranton & Forest City R. Co. from constructing its track across certain lands alleged to belong to the complainant. The trial court dissolved a preliminary injunction. The following is its opinion: "There can be no question but that a corporation, invested with the privilege of taking private property for public use, must make just compensation for property taken, injured, or destroyed by the construction of its works or improvements, and that such compensation must be paid or secured before such taking, injury, or destruction, (article 16, § 8, Const.), and that injunction is the proper remedy in case such corporation attempts to take, injure, or destroy property before the compensation therefor has been paid or secured. *Com. v. Pittsburgh & C. R. Co.*, 24 Pa. St. 119; *Unangst's Appeal*, 55 Pa. St. 128; *Stewart's Appeal*, 56 Pa. St. 413. There is, however, an obstacle in the way of continuing the injunction heretofore granted. The defendants not only deny the title of the plaintiff, but allege that they have the title to the *locus in quo*, and that they, and those under whom they claim, have been in possession thereof for many years. There is no formal proof of paper title; but the defendants show by the affidavit of J. W. Peck, from whom they purchased, as well as by the affidavits of a number of others, that John Messicar, and those claiming under him, were in possession of the

Injunction
against tak-
ing lands.

land for many years; that Mr. Peck bought of those in possession about twenty years ago; and that he sold to the defendant in March of the present year. On the other hand, the plaintiff claims to have purchased the land in 1871, and his deed was in evidence before me. I have no doubt the land described in the deed includes the land on which the defendant is constructing its railroad; but the plaintiff offered no evidence to show title in those from whom he bought, and no evidence as to who had been in possession of it, to rebut or overcome that offered by the defendant. When the plaintiff's right has not been established at law, or is not clear, but is questioned on every ground on which he puts it, he is not entitled to an injunction. *Rhea v. Forsyth*, 37 Pa. St. 503; *Minnig's Appeal*, 82 Pa. St. 373; *Washburn's Appeal* 105 Pa. St. 480. If the plaintiff were, or had ever been, in possession of the land, a different question might be presented; but I do not see my way clear to restraining the defendant from carrying on a legitimate enterprise on land of which they are in possession, and to which they claim the title, before the plaintiff's rights have been established at law.

"The plaintiff also alleges in his bill of complaint that the defendants are filling up the bed of the river, and diverting the channel thereof, and that this will cause him irreparable injury.

**Obstruction
of river—Ir-
reparable in-
jury.** He is in possession of lands on the east side of the river. His rights as a riparian owner are not defined. This part of the complaint appears to me to be based upon a misapprehension of the plans and purposes of the defendant. If the defendant intended to construct the retaining wall already begun to the middle pier of the Decker bridge, and to fill in all of the channel between such wall and the former bank of the river on the west side, the complaint would no doubt be well founded; but it appears from the maps and affidavits before me that, instead of building the wall to the middle pier of the bridge, they are only cutting into the rough banks of the river, and erecting a solid wall with a smooth surface to protect the banks of the river, and that the dirt now thrown into the river is from the excavations made for the wall, and that it is to be thrown back as filling. The engineers all testify that a wall with a smooth surface, such as is being constructed, instead of impeding the flow of the river, or deflecting it upon the plaintiff's land, will draw the water to itself, and increase the flow. If such is the case I do not see how the plaintiff will be injured. For these reasons the injunction heretofore granted was dissolved." Complainant appeals.

W. W. Watson and R. H. Patterson for appellant.

Charles H. Welles for appellee.

PER CURIAM.—The sole complaint in this case is that the court erred in not continuing the preliminary injunction. We are of opinion that there is no error in the decree complained of. Adhering to our general rule in cases of this class, we intimate no opinion on the merits of the case in other respects. The proper time to do that is when the case comes here, if it ever does, on appeal from a final decree of the court below. Decree affirmed, at the costs of appellant, and record remitted for further proceedings.

Injunction will not be Granted When Title not Clear.—See *East & West R. Co. v. East Tenn., V. & G. R. Co. (Ala.)*, 22 Am. & Eng. R. Cas. 81.

KELLER *et al.*

v.

MCCAULEY.

(*Pennsylvania Supreme Court, November 4, 1889.*)

Construction—Written Contract—Parol Evidence to Prove Subsequent Parol Agreement.—The sub-contractors for the masonry of a portion of a railroad executed a written contract by which it was stipulated that the masonry should be the same as the masonry between I. & M., which was considered second class. The contract specified the prices for second class and box-culvert masonry, but of no other class; and provided that the work should be done "as directed by the chief engineer" of the railway, and should be "paid for as estimated by the engineer in charge during the month." Masonry of a higher grade and class was required by the engineer than was contemplated by the parties and for which no price was fixed. Plaintiff alleged that when this exigency arose the contractors instructed the sub-contractor that the work could be done as directed by the engineer, and that they would pay him what it was reasonably worth. *Held*, that the sub-contractor might prove, by parol, the new and distinct agreement subsequent to the contract under seal, whereby upon a new consideration the original agreement was changed, and he agreed to do additional work, or the same work in a different manner, but that the sealed instrument contained the agreement of the parties so far as it had not been modified by the subsequent parol contract.

Same—Conclusive Effect of Engineer's Estimates.—Under the provisions of the sealed instrument that the work should be done as directed by the engineer and should be paid for as estimated by the engineer in charge during the month, the kind and classification of the work was for the engineer, and his estimates, monthly and final, were conclusive upon parties, and parol testimony is inadmissible in an action on the contract to prove the reasonable value of the work.

ERROR to Court of Common Pleas, Jefferson County.

Assumpsit by Peter McCauley against John Keller and another, partners, upon a contract for the masonry of a certain portion of a railroad, which was in the following terms:—
 “Articles of agreement made and concluded this 25th day of March, 1887, between John Keller and L. L. Bush, of Lancaster city, state of Pennsylvania, of the first part, and Peter McCauley, of Phillipsburg, Centre county, state of Pennsylvania, of the second part. Agreed that the said party of the second part will do all the masonry necessary for the completion of the Clearfield & Jefferson Railway between Mahaffey and Williams Run, in a good and workman-like manner, the same as masonry on same line between Irvona and Mahaffey. Said party of the second part to furnish all labor and material needed to do said masonry; also to do the masonry first where it will be necessary to start grading, or as may be desired by the superintendent of the said Keller & Bush. All work to be done as directed by the chief engineer of said railway. For which said parties of the first part promise to pay to the said party of the second part the sum of five dollars and fifty cents for all second-class masonry, and two dollars and fifty cents for box-culvert masonry, the same price to be paid for cubic yards. All work to be paid for as estimated by the engineer in charge during the month, and payments to be made on or about the 20th of the succeeding month, less ten per cent., which shall be kept back until the completion of the work. PETER MCCAULEY. JOHN KELLER & L. L. BUSH, per JOHN KELLER. Witness: J. A. CARTER.”
 The jury returned a verdict for the plaintiff upon which judgment was entered, and defendants bring error.

G. D., W. P. & Geo. A. Jenks and E. H. Clark for plaintiffs in error.

R. C. Winslow, J. E. Calderwood, B. J. Reid and Charles Corbet for defendant in error.

CLARK, J.—It is very plain that the parties to this contract had in contemplation that no part of the masonry between Mahaffey and Williams Run would be first class. Case stated. It was to be the same as the masonry between Irvona and Mahaffey, which had been constructed in the previous year, and was considered second class. The contract, in specifying the prices to be paid, made no provision for any first-class work. It is equally clear that the work was to be done “as directed by the chief engineer” of the company, and “that the work was to be paid as estimated by the engineer in charge during the month, payments to be made according to that estimate about the 20th of the succeeding month, less ten per cent.” etc. Under the written contract, therefore,

the engineer was the arbiter of the kind of work to be done, as well as of the class to which it belonged, and his decision determined the compensation which the plaintiff was entitled to receive under his contract. It turned out, however, that at certain points on the line masonry of a higher class and grade was required by the engineer than was contemplated by the parties, and the contract fixed no price for this higher grade of work. It is alleged on the part of the plaintiff that when this exigency arose the defendants instructed the plaintiff that the work could be done "as directed by the engineer," and that they would pay the plaintiff what it was reasonably worth; that the work required for arch masonry was of a superior quality and workmanship, and that the whole work as completed under the requirements of the engineer was of a better quality than that between Irvona and Mahaffey, which was mentioned in the contract as descriptive, in a general way, of the kind of work to be done; and this suit is brought, not only to recover for "extra" work, that is to say, for what the work done was worth more than was stipulated in the contract, but also for the balance remaining upon the work done under the special contract.

It was undoubtedly competent for the plaintiff, by parol, to show a new and distinct agreement subsequent to the contract under seal, whereby, upon a new consideration, the original agreement was changed and the plaintiff agreed to perform additional work, or the same work in a different manner. The rule that extrinsic evidence is not admissible to contradict or alter the written instrument is not thereby infringed. 1 Greenl. Ev. § 303; *Malone v. Doughty*, 79 Pa. St. 53; *Collins v. Barnes*, 83 Pa. St. 15. But, in such cases, the special contract will be pursued as far as it can be traced in the intention of the parties. The deviation, except where otherwise expressed or mutually understood, must be taken in its proper connection with the original contract, with reference to and in modification of which it was made. The theory of the plaintiff's case is that, according to the doctrine established in *Vicary v. Moore*, 2 Watts, (Pa.), 457; *Spangler v. Springer*, 22 Pa. St. 454, and other cases, to which it is unnecessary to refer, the parol agreement drew or retained the stipulation of the sealed instrument in parol, and turned the plaintiff over to his action of *assumpsit* for the balance due upon the entire work; but the provisions of both contracts thus became one entire parol agreement, and it is upon this ground, as we understand the case, that the plaintiff bases his right to recover his whole claim in this form of action. It is plain, then, that the sealed instrument must be supposed to contain the agreement of the

Proof of subsequent parol agreement.

parties to the full extent that it has not been modified by the subsequent parol contract, and that both taken together (the former being subject to the latter) state the agreement of the parties. If there had been no provision for estimates, etc., the plaintiff would, without doubt, have been entitled to recover upon a *quantum meruit* whatever he could show the work was worth; but all the work was to be done as directed by the engineer, and was to be paid for as estimated by the engineer in charge during the month.

The work covered by the parol agreement was the same work which was embraced in the special contract. It is alleged simply that it was to be performed in a different way if the engineer required it to be so done, and if the estimate of the engineer was not to determine its nature and extent it would doubtless have been so stated. The masonry was to be the same as masonry on the same line between Irvona and Mahaffey, but it was to be paid for as estimated by the engineer in charge during the month. If the work, under the requirements of the engineer, was of a higher class, it was for the engineer to determine and designate the class of work to which it belonged, according to the usual and customary methods in railroad construction. It is not to be supposed the parties intended the engineer, in making his estimates from time to time, was to compare in detail the work of 1887 with that of 1886, and that the compensation was to be rated accordingly. The contract provides the price to be paid for second-class work, the nature and characteristics of which were presumably known to the engineer, and this of itself indicates that the work was to be estimated according to a certain classification recognized in the business, and was to be compensated accordingly. Upon that basis of calculation the defendant would be held for the difference between the value of the work required and the sum stipulated in the contract. If the parties fixed any price for the work which was required to be done in a superior manner, that price would govern in the calculation of the amount; if not, the value of this class of work could be otherwise readily shown. But the kind and classification of work was for the engineer, and his estimates, monthly and final, were conclusive upon both parties. Although the character of the work to be performed is described, in a general way, as the same as the masonry between Irvona and Mahaffey, yet it was to be done "as directed by the engineer of the company," and in a good and workmanlike manner. Although, as between the contracting parties themselves, the work would be satisfactory if it was the same as the masonry between Irvona and Mahaffey, yet it was required

Conclusive effect of engineer's estimates.

to be done as directed by the engineer. McCauley entered into this contract with notice of the duties and powers of the company's engineer. He took his chances with the engineer, and was to receive pay as for second-class work. It is conceded that the masonry between Irvona and Mahaffey was second-class work of an inferior quality; but this work, although of the same class, was to be performed in a good and workmanlike manner, as directed by the engineer. First-class work was not contemplated, but, when work of that class was afterwards required, the parties appear to have provided for it in a subsequent parol agreement. How much of this first-class work the engineer directed to be done, and how much was actually performed in pursuance of his direction, was for the engineer to estimate; and his certificate, fairly made without fraud, was, by the terms of the contract, binding upon the parties. We are of opinion, therefore, that the court erred in throwing this inquiry open to the opinion and estimate of those who casually observed the work, the parties having designated a person for this purpose, a person whose classification of the work and measurement of the amount were necessarily binding in the computation of the plaintiff's claim. That the parties so understood their contract is shown by the fact that monthly settlements were made upon the estimate of the engineer, and the work was paid for and receipts taken in accordance therewith. The estimates, it is true, were in some instances modified and changed, but the classification and measurement of the engineer constituted the general basis upon which these settlements were made. It is unnecessary, we think, to consider, the assignments of error in detail. If we are right in what we have said, the case was tried under a mistaken view of the nature and obligations of the contract. If, at the retrial, the cause is conducted upon the theory suggested in this connection, the other matters assigned for error cannot arise. The judgment is reversed, and *venire facias de novo* awarded.

Construction Contracts—Finality and Effect of Engineers' Estimates.—See Louisville, E. & St. J. R. Co. v. Donnegan (Ind.), 34 Am. & Eng. R. Cas. 116, and note 117.

40 A. & E. R. Cas.—33

YOUNG

v.

TOLEDO & SOUTH HAVEN R. CO.

(Michigan Supreme Court, October 18, 1889.)

Sale—Uncompleted Railroad—Construction of Statute.—Where a railroad company has neither station houses, side tracks nor turn tables, nor any rolling stock that is fit for use, and has leased what it uses about as long as it can, its roadbed is uncompleted within the meaning of a statute authorizing companies whose railroads have not been completed to sell the same.

Same—Validity of Proceedings.—A statute authorized a railroad company to sell its railroad and franchises provided two thirds of the stockholders consented thereto at a meeting called for the purpose. A proposition for the purchase of a railroad having been made, stockholders representing 680 out of a total of 750 shares voted for a resolution authorizing the same at a meeting specially called for the purpose, and the directors were authorized to consummate the sale. Thereafter, the directors by resolution authorized the president and secretary to sell and convey the property and execute all necessary deeds. *Held*, that the proceedings showed a legal sale of the railroad.

Same—Sale of Stock by Stockholder—Notice of Meeting.—A stockholder in a railroad company, who had agreed to sell his stock to a company which proposed to purchase the road, transferred his stock to a person who was in confidential relations with, and employed by, both companies. *Held*, that although the person purchasing the stock was not present at the meeting authorizing the sale and had no notice thereof, yet the sale would not be set aside in an action at his instance, but that he would be required to transfer his stock to the purchasing company at its fair value, or at his election, to take the benefit of the sale of the road.

APPEAL from Circuit Court, Van Buren County.

Tenney, Bashford & Tenney and *E. R. Annable* for appellant.
John T. Breck and *Dallas Bondeman* for appellee.

SHERWOOD, C. J.—The complainant, as a stockholder, owning 75 shares of stock in the Paw Paw Railroad Company, filed the bill in this case on the 21st day of January, 1887, and prayed the court to set aside the sale of

Facts. the Paw Paw Railroad to the Toledo & South Haven Railroad Company, made on the 9th day of September, 1886, and that the subsequent mortgage, given on the 21st day of October to the Farmers' Loan & Trust Company by the Toledo & South Haven Railroad Company, be annulled, and that the

sale of the bonds secured thereby be enjoined, and that a reconveyance of the Paw Paw Railroad be decreed to the company; that an accounting be had of the rents and profits accruing from the use of the Paw Paw road since the sale to the Toledo & South Haven Railroad Company on the 9th of September, 1886; and that a receiver be appointed for that purpose. The two railroad companies were served with process. The trust company was not served, and the Toledo & South Haven Railroad Company alone appeared and made answer. In its answer the Toledo & South Haven Company averred the validity of its purchase from the Paw Paw Railroad Company on the 9th of September, 1886, and of the bonds subsequently issued, and charged that complainant purchased his stock in bad faith, and for the purpose of compelling its purchase at an exorbitant price by the Toledo & South Haven Company. After replication had been filed, and the cause was at issue, the several railroad companies interested were consolidated, under § 3343, How. St. The bonds previously issued were ratified, as were the other terms of the September purchase, and, so far as the companies could, both were ratified. After the consolidation was completed, the Toledo & South Haven Company set up the consolidation-proceedings as a defence, "*puis darrein continuance*," by cross-bill, and which was subsequently brought to an issue. The testimony was taken in open court, and, upon the hearing, the circuit judge rendered a decree granting the complainant in the original bill relief substantially as asked, except as to the appointment of a receiver, and dismissed the cross bill, without passing upon the validity of the consolidation proceedings. The Toledo & South Haven Railroad Company appeals to this court.

The Paw Paw Railroad Company was incorporated under the General Laws of the state in 1866, and runs from the village of Lawton to Paw Paw. The company commenced running trains upon its road in 1867, which it continued to do until about the 9th of September, 1886. The capital stock of the company consisted of 750 shares, of \$100 each. It is claimed by complainant that the road was fully built, equipped and completed. This, however, is denied by the defendant, in its answer; and, as to this, defendant says that the Paw Paw Railroad Company, a long time previous to September 9, 1886, had been engaged, in good faith, in constructing its road and tracks, but had not been at that time, and never was, able to complete the construction of the same; that only the roadbed was constructed, and that very imperfectly; that it had no side tracks, no turn tables, no station houses, and no rolling stock; that all of those in use by it were con-

structed by, and belonged to, the Toledo & South Haven Railroad Company. The Toledo & South Haven Railroad Company was organized in 1876. It extends from Lawton to South Haven, as completed—a distance of 36 miles. It passes through Paw Paw, Lawrence, and Hartford. The road is a narrow guage, 9 miles of which, between Paw Paw and Lawrence, was built in 1876; and in 1883 it completed its road from Lawrence to Hartford—a distance of 6 miles; and on September 9, 1886, it purchased of the Lake Michigan division of the Toledo & South Haven Railroad Company a partially completed extension between Hartford and South Haven,—a distance of 16 miles,—and at the same date purchased the Paw Paw road, as before stated. The Paw Paw road was at this time mortgaged for \$3,000. In 1875 its stock was worth but about 40 per cent.; and in 1878 it leased its roadbed to the Toledo & South Haven Railroad Company for 8 per cent. on \$30,000, or 40 per cent. of the par value of the stock. At an early day it became very desirable for the Toledo & South Haven Railroad Company to make its connection with the Michigan Central on the east, at Lawton, and with the lake on the west, at South Haven; and on the 21st of June, 1884, the complainant in this case went into the employment of that company and the Paw Paw Company to aid in accomplishing this result. This agreement will be seen in the margin.¹ Under this agreement, it would appear,

1. The following agreement is this day entered into between F. B. Adams, president, Edwin Martin, treasurer, John Ihling, superintendent of the Paw Paw and the Toledo & South Haven Railroad Company, parties of the first part, and Chas. F. Young, of Paw Paw, Michigan, party of the second part; The provisions of this agreement are that the party of the second part shall place, on or before September 1st, 1884, one hundred and fifty thousand dollars (\$150,000) of 4 per cent. twenty (or thirty) year first mortgage bonds of the Toledo & South Haven Railroad Company, (both corporations to be consolidated under the one name, and title perfected;) said bonds to be sold at ten per cent. discount (or 90-100) from their face value, or one hundred and thirty-five thousand dollars (\$135,000) net. The proceeds from such sale of bonds shall be used as follows, to-wit, viz.: *First.* [\$50,000,] Fifty thousand dollars to pay up in full the funded and compounded indebtedness of the "Toledo & South Haven R. R. Co." *Second.* [\$20,000,] Twenty thousand dollars to purchase the interest of parties of the first part in and to the "Paw Paw R. R. Co." *Third.* [\$12,000,] Twelve thousand dollars—this amount being one-half (1-2) the purchase price; balance to be paid in new stock—to apply on purchase of the Toledo & South Haven Railroad. *Fourth.* [\$53,000,] Fifty-three thousand dollars to be used as a sinking fund for the completion of ten miles (or more) of new railroad to some point east of Lawton, or west of Hartford, as may be deemed to the best interest of the company hereafter. This estimate includes cost of ten miles of "tubular rail" to be contracted for by party of second part at times of placing bonds, cost of said tubular rail not to exceed cost of standard T rail of same weight. Of the said \$135,000 proceeds of the sale of said bonds, \$90,000 shall be subject to call of said parties of the first part immediately after the issue of said bonds, duly executed and accepted; provided, that \$50,000 of the said \$90,000 shall be deposited with the trustee or trustees, or as may be hereafter agreed upon, for the purpose of

the consideration the complainant was to receive for his services depended upon the success of the enterprise. About the 1st of August following, the complainant refused to go further, under the contract, without pay; and from that time on he was in the employ of the companies, and under their pay, for what he did to accomplish the same general result contemplated by the contract.

J. Rely Bangs, of Paw Paw, at the time the contract was made, owned 75 shares of stock in the Paw Paw Railroad Company, which he purchased on the 3d day of April, 1884,

paying up the entire funded and compounded indebtedness of the said railroad Co. The balance of the amount (\$45,000) shall be drawn upon at the rate of \$5,000 per mile as new road becomes completed; such amount to be paid, on certificate of engineers in charge, to the trustee or trustees. Parties of the first part agree to hold in reserve, subject to the call of the company, the \$32,000 arising from the sale of their undivided interest in said railroads, as a capital fund to assist, if necessary, in completing said ten miles of new railroad: provided, that under no circumstances shall they individually be called upon to furnish from their private means at any one time, or during the completion of said ten miles of road, any moneys in excess of the said \$32,000, and upon such amount as may be furnished from time to time, by parties of first part, from the said \$32,000, during the building of said ten miles of road. Parties of first part shall receive interest at the rate of 4 per cent. per annum; such interest to be paid from the earnings of the road; time of payment of principal to be dictated by parties of first part. Immediately after the issue of the said \$150,000 bonds, and the acceptance of same, and deposit of \$90,000 in cash by the purchasers subject to the call of the company, as before mentioned, then there shall be issued two hundred and twenty-five thousand dollars of stock upon the thirty miles of road, and said \$225,000 of stock shall be divided as follows, to-wit: *First.* [\$12,000.] Twelve thousand dollars to parties of first part (as balance of purchase money before mentioned) to pay in full for Toledo & S. H. R. R. *Second.* [\$25,000.] Twenty five thousand dollars (to be held as a reserve fund by all parties to this agreement) with which to buy up all interests in the Paw Paw Railroad held outside of parties of first part, and which, when bought up, shall be divided equally between all parties to the contract. *Third.* [\$188,000.] One hundred and eighty-eight thousand dollars shall be divided equally between the parties to this contract, or forty-seven thousand dollars (\$47,000) each. And it is agreed and understood that such payments of cash and stock as are herein provided for shall cover in full all of the individual interest of said parties of the first part in and to said railroad corporation. In consideration of one dollar, the receipt whereof is hereby acknowledged, and the sale of said bonds being made by the party of the second part, parties of first part agree to convey and make over to the party of the second part forty-seven thousand dollars in stock, and a one-fourth (1-4) interest in all the real and personal property of said railroad corporation; said stock to be issued and transfer made as soon as bonds have been accepted, and the deposit of \$90,000 made as herein specified. It is understood and agreed upon by all the parties of the contract that the failure upon the part of party of second part to place said bonds shall make this contract null and void, and parties of first part shall be under no obligation to pay any expenses in case of failure.

Witness our hand and seals this twenty-first day of June, eighteen hundred and eighty-four.

F. B. ADAMS, President.	[L. s.]
EDWIN MARTIN, Treasurer.	[L. s.]
JOHN IHLING, Supt.	[L. s.]
CHAS. F. YOUNG.	[L. s.]

of G. W. Longwell, who obtained it from the company in August, 1875. This is the stock now held by complainant. It nowhere appears that either of these owners objected to anything that was done, or which the company proposed to do, while they were stockholders. On the 6th day of February, 1886, Bangs sold this stock to Thomas Walch. He lived in Paw Paw, and the Paw Paw Railroad Company had its office there. He held the stock during the entire period the complainant was in the employment of the two defendant companies, and, so far as appears, he knew of all the action and doings of both companies, and what was contemplated and desired by both; and it is claimed by the defendant answering that, knowing of the contemplated sale of the Paw Paw road to the Toledo & South Haven Railroad Company, he not only approved of it, but actually agreed to sell and transfer the said 75 shares of stock to the Paw Paw Company, or to those representing it, to aid in the accomplishment of the sale, at 40 per cent. of the par value; that the complainant knew of this, and that he was employed by the companies defendant to accomplish this object; that instead of doing this, however, in violation of the trust and confidence placed in him by his employers, knowing that these shares were the only outstanding stock not purchased in the interest of the company, to enable it to complete the sale to the Toledo & South Haven Company, and with a view to compel the Paw Paw Company to pay more for the stock than it had to any of the other stockholders for their stock, he purchased of Walch, only the day before he had agreed to sell the same to the company, said stock, and, instead of taking the transfer of the same to or for use of the company, took it directly to himself, and now holds the same, as defendant claims, in violation of the equitable rights of the defendant companies, and refuses to sell or to transfer the same to either of them for less than its par value. It is true that many of these statements are denied by the complainant, but in the main I think they are borne out by the circumstances and testimony in the case, and for this reason, the defendant claims the complainant asks unconscionable relief; that, while he asks equitable relief, he has violated good faith with both companies, and has failed and refused to do equity, and that his action and conduct have been such, in the premises, as to estop him from asking the remedy he now seeks; that to do so would be to seriously affect injuriously large public as well as private interests, obtained and now enjoyed in perfect good faith, and could subserve no good or equitable purpose, or protect any just rights of the complainant. And there is much ground for this contention of defendants, if the legal *status* of the defendant com-

panies can be sustained. On the 1st day of November, 1886, the Toledo & South Haven Railroad Company executed bonds of \$1,000 each to the amount of \$216,000. Said bonds are negotiable, and draw interest at the rate of 6 per cent. per annum, and the bonds are secured by a mortgage upon all the property of the company, which includes the Paw Paw Railroad, running to the Farmers' Loan & Trust Company, which is made a defendant in the bill. And the complainant's counsel, on the hearing in the court below, claimed that the relief complainant was entitled to, if he prevailed, as against the defendants, was an injunction restraining defendants from negotiating said bonds until they should purchase the 75 shares of stock, and pay him such sum as the court might deem reasonable therefor. It will be recollected that the consideration the Toledo & South Haven Railroad Company paid for the Paw Paw road was stock in the former road at par. The stock of the one was to be exchanged for the stock of the other.

In this court the contention of the complainant is—*First*. That the sale made by the Paw Paw Railroad Company to the South Haven Railroad Company was void for two reasons: (1) Such sale is only authorized by the statute of an uncompleted road, and complainant claims the Paw Paw Railroad, at the time of the sale, was a completed road; (2) That the complainant was a stockholder in the road, and neither he nor Mr. Walch, of whom complainant purchased his stock, had any notice of the meeting of the stockholders at which the resolution was passed authorizing the sale of the road.

As already intimated, I have no doubt, upon the testimony, but that the Paw Paw Railroad was uncompleted at the time the sale was authorized. It had neither station-houses, side tracks nor turn-tables; neither had it any rolling-stock that was fit for use, and it had leased what it used about as long as it could; and I think it is quite clear, from the testimony, that the company was unable to complete its construction by furnishing what was necessary for its successful operation, and this is what I understand to be necessary for the completion of any railroad. The section of the statute under which it is claimed the sale was authorized and made reads as follows: "Section 1. That it shall be lawful for any railroad company in this state which shall have entered in good faith upon the work of constructing its road, and shall have become unable to complete the construction of the same, or of any part thereof, to sell and convey the whole, or any part, of its road so partially completed, together with the rights and franchises connected therewith, to any other rail-

Railroad held
to be uncom-
pleted at time
of sale.

road company or corporation of this state not having the same terminal points, and not being a competing line: provided, that at any general or special meeting duly called for that purpose the stockholders carrying (owning) two-thirds of the stock of said company shall consent thereto: and provided, further, that the company or corporation so purchasing shall hold such property and franchises subject to all the obligations and duties, and with all the rights and privileges, prescribed by the general railroad law of this state." The foregoing provision of the statute was sufficient to authorize the proper proceedings to make the sale of the Paw Paw Railroad to the defendant, and there is no doubt but that the sale was authorized by the stockholders owning two-thirds of the stock.

The stock consisted of 750 shares, and the stockholders representing 680 of the 750 were present at the meeting at

**Validity of
proceedings
authorizing
sale.**

which the action was had, and voted for the resolution authorizing the sale, and the vote was unanimous. This meeting was held after the Toledo & South Haven Railroad Company had made its purchase of the Lake Michigan division of said road, and a proposition had been made by the Toledo & South Haven Railroad Company to the Paw Paw Railroad Company to purchase its road. The proposition, and the action taken upon it, appears by the following preamble and resolution, adopted by the stockholders when all were present but complainant, viz.: "Whereas, the Toledo & South Haven Railroad Company has proposed to buy the franchises and property of this company, and to pay for the same in full-paid stock of that company, in amount equal to the outstanding stock of this company, on terms that this company will procure its stock to be transferred to that company, and exchange its stock therefor, dollar for dollar, with the present holders of the stock of this company; and it appearing to be for the manifest interest of this company to make such sale at that price and on those terms: therefore, resolved by the stockholders of the Paw Paw Railroad Company, all present concurring, that said proposition of the Toledo & South Haven Railroad Company be, and the same is hereby, accepted; and the directors of this company are hereby authorized and directed to consummate said sale without delay." This action seems to have been by a quorum of the stockholders, and places the further proceedings to consummate the sale in the hands of the directors, and which was finally completed by the execution of a proper conveyance of the Paw Paw Railroad property to the Toledo & South Haven Railroad Company on the 9th day of September,

1886. The conveyance was made by the president and secretary of the company, under the following resolution passed by the board of directors of the Paw Paw Company, viz.: "Resolved by the directors of the Paw Paw Railroad Company that, in pursuance of the authorization of the stockholders of said company, the president and secretary are authorized and directed to sell, transfer, grant, convey, deliver and assure to the Toledo & South Haven Railroad Company all the franchises and property of the Paw Paw Railroad Company, and to make, execute, acknowledge and deliver all necessary and usual deeds, assignments and transfers, under their hands and the seal of this company, to accomplish and complete such sale, with usual covenants, in consideration of the sum of seventy-two thousand five hundred dollars of the full-paid capital stock of the Toledo & South Haven Railroad Company, the same to be issued on demand to the present stockholders of this company, dollar for dollar, in exchange for the shares now held by them in this company, upon the transfer of such shares and delivery thereof to said Toledo & South Haven Railroad Company." These proceedings show a legal sale of the Paw Paw Railroad to the Toledo & South Haven Railroad Company.

Under *second* ground, complainant contends that he had no notice of the meeting at the time the proposition for sale was commenced, and that none was given, as required by law; and that he was not present in person, nor represented by proxy, at such meeting; and that he in no way has consented to the action taken at that time. He, however, does not aver that he would not have voted for such sale had he been present. The fact appears that he purchased his 75 shares of stock, the day before the meeting, of Mr. Walch, who, as I think the testimony shows, had reason to know that the Paw Paw company desired to make the sale, and had himself agreed to sell to the company said stock to enable it to make the sale, and he was honorably bound to carry out such agreement at the time he made the transfer of his stock to the complainant. It is for the want of notice of this meeting that the complainant claims the sale is void, and upon this ground insists that it should be so decreed, to save his equitable rights. In view of the relations the complainant had previously sustained to the two defendant companies, and of what must have been his knowledge of the object of the action they had taken in the premises, I think he should be regarded as holding subject to the equitable considerations growing out of the arrangement made by his vendor of the stock with the parties acting in the interest of the Paw Paw Company, and that

Notice of
meeting.

the most that complainant could claim, under the circumstances, in equity and justice, against the company, would be what the defendant offered to pay him, stated in the answer to complainant's bill, viz.: the fair value of the 75 shares of stock at the time the Toledo & South Haven Company purchased the Paw Paw Railroad. I can discover no fraud or any attempt to defraud the complainant on the part of the company answering the bill; but all the circumstances, I think, quite clearly show a want of good faith in the demands made by the complainant upon the Toledo & South Haven Railroad Company.

The complainant appears in a court of equity to seek and enforce what he conceives to be his equitable rights, and in so doing he must submit to do what is right and just; and in my judgment his counsel at the circuit, in submitting the case to the learned circuit judge, was not far out of the way when he stated to the court the claim of his client should be satisfied with the payment of such amount as the stock he held was worth; and while he cannot be held to the mode of payment provided by the terms of purchase by the Toledo & South Haven Railroad Company, because of his consent never having been obtained thereto in any legal way, equity and justice requires that he should transfer to said company his 75 shares of stock upon receiving or being tendered the value of the same at the time the company made its purchase in money; and we think it is not necessary to refer the case back to take further proofs as to the value of the stock, but will allow the amount at the sum of \$3,500; or, in lieu thereof, the complainant shall be at liberty, if he shall elect so to do, to surrender the 75 shares to the Toledo & South Haven Railroad Company, and take the stock of that company for an equal amount.

The decree entered must be reversed, and a new decree made in this court in accordance with this opinion, with costs to defendant in this court. Neither party will recover costs as against the other at the circuit. We do not deem it necessary to discuss the other ground relied on for affirmation by complainant's counsel. The other justices concurred.

ST. LOUIS, ARKANSAS & TEXAS R. CO.

v.

MATTHEWS.

(*Texas Supreme Court, November 12, 1889.*)

Mechanics' Liens—Laborer Employed in Construction—Under a statute which gives a lien to "mechanics, laborers, and operators who have performed labor or work with tools, teams, or otherwise, in the construction of any railroad," a "laborer" is one who performs manual services in the construction of the railroad, and not one who may work in preparing ties to be furnished to and used by the railroad at a price named.

APPEAL from District Court, Bowie County.

Todd & Hudgins for appellant.

Vaughn & Leary for appellee.

STAYTON, C. J.—This action was brought by appellee against T. J. Lowe and the appellant company to recover from the former a sum claimed to be due from him, and to establish and foreclose a lien on appellant's railway to enforce its payment. Case stated. Appellee sought to recover \$329.50 from Lowe, who was alleged to have been a contractor engaged in furnishing railroad ties to appellant, to be used in construction and repair of its railway, to whom he claims to have delivered ties at fixed prices, which were used in the construction and repair of the railway. To show the character of his claim, appellee alleged that "he was a laborer employed by Lowe as such contractor; that Lowe requested plaintiff to make and deliver to him on said company's right of way * * * certain cross ties, for which he agreed and promised to pay the plaintiff, when the same should be inspected and received by the said railroad company, * * * the sum of twenty-eight cents per tie for all good ties so delivered by plaintiff, and the sum of fourteen cents per tie for culled or faulty ties. * * * That pursuant to said request of said Lowe the plaintiff made and delivered to said Lowe * * *; that said sums of money are due and owing the plaintiff for his personal services, as wages earned in the construction and repair of said railroad," etc. By exception, appellant questioned the jurisdiction of the

court on two grounds: (1) because the amount sued for was not sufficient to give jurisdiction; (2) because the facts alleged did not show that appellee had a lien on the railway. There was no exception to the petition on account of its generality of statement; and, on hearing the exceptions to the jurisdiction of the court, these were overruled. A trial was had, which resulted in a judgment for appellee for a part of the sum claimed by him, with foreclosure of lien on that part of appellant's railway and equipments within this state.

The sum claimed not being sufficient to confer jurisdiction on the district court, the inquiry arises whether the petition stated such facts as gave a lien on the railway. The exceptions raised this question. The statute gives lien to "mechanics, laborers, and operatives who have performed labor, or worked, with tools, teams, or otherwise, in the construction, operation, or repair of any railroad, locomotive, car, or other equipment of a railroad, and to whom wages are due and owing for such work." Sayles' Civil St. 3179a. But it does not give a lien to persons who furnish material for such construction or repairs. The petition alleges that appellee was a "laborer employed by Lowe," and that the sum claimed by him "is due and owing to plaintiff for his personal services, as wages earned in construction and repair of said railroad." The statement that he was a "laborer," and that the sum claimed by him was due for his "personal services and wages," are but the statement of conclusions, which cannot be given effect unless the facts stated show him to have been a laborer and entitled to wages for personal services. The word "laborer," as used in the statute, evidently means one who performs manual services in construction, repair, or operation, contemplated by the statute, and does not embrace one who may work in preparing something of his own to sell to a railway company, after it has been rendered suitable through his toil, to be used in the construction or repair of a railway. The words "labor," "work," "personal services," and "wages," used in the statute, render this clear, if we attach to them their ordinary signification. The facts stated are that Lowe requested appellee to make and deliver ties, and promised to pay a sum named for each tie when inspected and received by appellant, and that he did make and deliver, as per request, a certain number of ties, which were inspected and received, for which, at the price agreed upon, he was entitled to recover the sum claimed. The legitimate inference from these averments is, that appellee took a contract to furnish ties at a price named, and did so, and that in preparing and delivering them he bestowed his personal services; that he sold ties

Laborers engaged in construction.

which may have been prepared by his own toil, but did not perform manual services in the construction, repair, or operation of appellant's railway. Looking to the averments of fact contained in the petition, under a liberal intendment, we are of opinion that the petition does not state facts giving a lien, and that the demurrers should have been sustained. The evidence in the case, which consisted solely of the testimony of appellee, tended to show that he was a seller of ties, rather than a laborer; and, had the petition stated facts sufficient to give lien, we are of opinion that the evidence was not sufficient to sustain the judgment. The judgment will be reversed and the case remanded.

Liens for Labor in Constructing Railroads.—See *Purtell v. Chicago Forge & Bolt Co.* (Wis.), 39 Am. & Eng. R. Cas. 242; *Martin v. Michigan & O. R. Co.* (Mich.), 26 *Id.* 351, note, 25 *Id.* 273; *Buncombe Co. v. Tommey* (U. S.), 20 *Id.* 495, note, 503; *Chicago, etc., R. Co. v. Sturgis* (Mich.), 6 *Id.* 619; *Delaware L. & W. R. Co. v. Oxford Iron Co.* (N. J.), 1 *Id.* 205.

ST. LOUIS, FORT SCOTT & WICHITA R. CO.

v.

TIERNAN.

(37 Kan. 606.)

Directors—Power to Fix and Pay Salaries of Officers.—The board of directors of a railroad company can, by resolution at one of their meetings, fix the salaries and order payment of the officers of the company, who commenced to work for the success of the enterprise at a time when the company had no funds, with a common understanding and agreement that, if they succeeded in building any portion of the road sufficient to produce a revenue, a fair compensation should be paid them out of the revenue so produced, and such compensation and payment may be fixed and ordered paid, long after the services are performed.

Salaries—Note of Company—Validity—Non-Compliance with By-Laws.—Where the board of directors of a railroad company, at a regular meeting, authorized and directed its promissory note to be executed by the president of the company, in payment of the salary of one of its officers, when a by-law of the company provided that it shall be drawn by the auditor to the president, etc., it is not a good defense to an action on the note, that there had not been a strict compliance with all the requirements of the by-laws, in the execution of the note. The services having been performed for the payment of which the note was issued by the company, any matter of form and not of substance ought not to defeat the recovery.

Same—Authority to Execute Note.—The authority of the officers of the railroad company to execute the note having been put in issue by the sworn answer of the company, some preliminary proof of their authority should have been given before the note was read in evidence; but this error was cured by the subsequent introduction of evidence tending to show all the circumstances under which the note was executed.

Same—Part Payment—Acknowledgement of Liability.—Part payment by order of the managing officer of a railroad corporation, of a claim of one of its officers for two years' salary, the payment having been made subsequent to the rendition of the service, is an acknowledgement of liability on the part of the company.

Promoters—Signature to Charter—Fiduciary Relations.—A person who signs his name to the charter of a contemplated railroad company, some time before it is filed in the office of the secretary of state, does not by that act alone assume a fiduciary relation towards the projected corporation. A corporation has no existence until the date of the filing of its charter, and the persons named therein as directors for the first year assume or incur no obligations until it is filed.

Same—Who Are Promoters.—To constitute a person a promoter of a railroad corporation, it must affirmatively appear that he was acting for and in behalf of the proposed incorporation, or that he assumed to so act, and that, on the strength of this authority or assumption, the party complaining so dealt with him.

Same—Sale of Roadbed—Payment in Capital Stock.—The owners of a graded railroad bed, can sell the same to a railroad company, whose officers, directors, and stockholders are composed of the owners of the roadbed, and receive in payment therefor shares in the capital stock of the railroad company, at a time when those who sell the roadbed, and own and control the railroad company, are the absolute owners of all the stock issued by the railroad company, and where the terms of sale, and the issue of stock, are matters of record on the books of the railroad company, and when the transaction occurs months before any other or additional stock is issued by the railroad company.

Corporate Records—Parol Evidence to Explain.—Parol evidence is admissible to show that a resolution of the board of directors of a railroad company, entered upon the record of their proceedings, did not correctly recite the amount of money found due and ordered to be paid to one of its officers.

COMMISSIONERS' decision. Error from District Court, Bourbon County.

On the tenth day of December, 1884, Francis Tiernan filed his petition against the St. Louis, Fort Scott & Wichita Railroad Company in the district court of Bourbon county in the words and figures following, to wit:

" PETITION FOR MONEY ONLY.

" The plaintiff, for cause of action, says:

" (1) That the defendant is a corporation duly organized under and by virtue of the general laws of the state of Kansas. *Second.* That the defendant is indebted to this plaintiff upon a promissory note, of which the following is a copy, to wit:

FORT SCOTT, March 10, 1882.

" One hundred and eighty days after date the St. Louis, Fort Scott & Wichita Railroad Company promises to pay to

the order of Francis Tiernan, ten thousand dollars, value received, payable at the First National Bank, Fort Scott, Kansas, with interest from date at ten per cent. per annum, the same being for salary from February 3, 1880, to February 3, 1882.

ST. LOUIS, FORT SCOTT & WICHITA R. R. Co.

"By A. M. AYERS, President.

"Attest: IRA D. BRONSON, Secretary.

[Seal—St. L., Ft. S. & W. R. R. Co.]

—"That said note was for salary as president and vice-president and general manager from February 23, 1880, to March 7, 1882, and by mistake and recital was as above set forth. Wherefore, plaintiff demands judgment on said note as against this defendant in the sum of ten thousand dollars, with interest at ten per cent. per annum from March 10, 1882.

"(2) And for a second and further cause of action this plaintiff says that the defendant is indebted to this plaintiff for salary as president and general manager of this defendant railroad company from March 7, 1882, to March 7, 1884, at an agreed and understood rate of five thousand dollars per year, and this plaintiff alleges that he was, and acted and performed the duties and services of president and acting general manager of said defendant railroad company during the whole period of time from March 7, 1882, to March 7, 1884, and that such services were well worth the sum of five thousand dollars per year.

"*Second.* And this plaintiff alleges that he has received from said railroad company, this defendant, at various times, the following sums and amounts of money, which he hereby credits and applies upon his account for salary from March, 1882, to March, 1884, to-wit:

By corn delivered in 1882, - - - - -	\$ 48 60
" " " 1883, - - - - -	52 35
1883, cash received to settle Whittaker claims, - - - - -	1,500 00
Oct. 21, 1884, cash on account, - - - - -	3,000 00

Total, - - - - -	\$4,600 95
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"Wherefore plaintiff demands judgment against the defendant in the sum of ten thousand dollars, with interest at seven per cent. on five thousand dollars from March 7, 1883, and interest on five thousand dollars from March 7, 1884, less said credit of four thousand six hundred and 95-100 dollars. Wherefore, plaintiff demands judgment against the defendant for fifteen thousand three hundred and ninety-nine and 5-100 dollars with interest at ten per cent. per annum, from March 10, 1882, and costs of this action."

On January 10, 1885, the defendant filed its answer, in words and figures as follows, to wit:

ANSWER.

"(1) The defendant, for answer to the first cause of action in plaintiff's petition set forth, says that the pretended promissory note therein set forth was not executed by this defendant and that A. M. Ayers, as president, and Ira D. Bronson, as secretary, of this defendant were not authorized by this defendant to execute the same, and that the same is not the note or obligation of this defendant.

J. H. RICHARDS,

"A. A. HARRIS,

"Attys. for Def't.

"*State of Kansas, County of Bourbon* } ss.: J. W. Miller, being duly sworn, says that he is the vice-president and general manager of the defendant herein, the St. Louis, Fort Scott & Wichita Railroad Company; that he has read and knows the contents of the foregoing answer; and that he verily believes the statements therein made are true.

J. W. MILLER.

"Sworn to and subscribed before me this eighth day of January, 1885.

[Seal.]

"J. S. WEST, Notary Public.

"Commission expires March 17, 1885.

"(2) For a second and further answer to the first cause of action in plaintiff's petition set forth, defendant says that it is and has been a duly incorporated railroad company, under the laws of the state of Kansas, from and since February 23, 1880; that the plaintiff was one of its original promoters, incorporators, and directors, and has, from February 23, 1880, continuously remained a director, and is such now, having during all that time assumed and taken upon himself the duties of a director, and continued and acted as such; that on February 28, 1880, the plaintiff was elected president of this defendant, and acted as such to March 9, 1881, at which time he was elected vice-president and general manager, and so continued and acted as such to March 10, 1882; that on May 10, 1880, the plaintiff was elected a member of, and chairman of, the executive committee of the board of directors of this defendant; said executive committee being, by resolution of the board of directors, vested with the power of making contracts, transacting business, and appointing officers on behalf of and for this defendant, and from May 10, 1880, to March 10, 1882, said executive committee exercised such powers, and were during that time mainly the managing body of the corporation; that previous to March 10, 1882, no promise, agreement, or contract had been made by this defendant to or with the plaintiff to pay him any sum of money for his services as president, vice-president, director,

or general manager; that he agreed to serve as such without the payment of any salary therefor.

"(3) The defendant, for answer to the second cause of action in plaintiff's petition set forth, admits the payment to the plaintiff of the sum of \$4,600.95 at the times therein stated; but defendant says that this sum of money was paid by the officers of this defendant without authority from this defendant, and when the plaintiff had no just demand therefor against this defendant, and that the plaintiff wrongfully appropriated the same to his own use; and, except as herein admitted, defendant denies all, each, and every allegation in said second cause of action set forth, and demands judgment against plaintiff for the sum of \$4,600.95, and interest from this date.

"(4) The defendant, for further answer to plaintiff's petition and for cause of action against him, says that this defendant was duly incorporated as a railroad company under and by virtue of the laws of the state of Kansas, on February 23, 1880, for the purpose of constructing and operating a line of standard gauge railroad from a point on the eastern line of said state, east of Fort Scott, in Bourbon county, to Kingman, in said state,—a distance of about 250 miles; and that, from the time of its incorporation up to this time, it has continuously exercised the rights, powers, privileges, and franchises of a railroad company, under the laws of the state of Kansas; that the plaintiff was one of its original promoters, incorporators, and directors, and has, from February 23, 1880, continuously remained a director, and is such now, having during all that time assumed and taken upon himself the duties of a director, and continued and acted as such; that on February 28, 1880, the plaintiff was elected president of this defendant, and acted as such to March 9, 1881, at which time he was elected vice-president and general manager, and so continued and acted as such to March 10, 1882; that on May 10, 1880, the plaintiff was elected a member of, and chairman of, the executive committee of the board of directors of this defendant, said executive committee being, by resolution of the board of directors, vested with the power of making contracts, transacting business, and appointing officers on behalf of and for this defendant; and from May 10, 1880, to March 10, 1882, said executive committee exercised such powers, and were during that time mainly the managing body of the corporation; that as such president, vice-president, general manager, member of, and chairman of, the executive committee of the board of directors of this defendant, the plaintiff was the managing and chief administrative officer of this defendant; that on January 12, 1881, the plaintiff and one A.

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M. Ayers, who was then a director and vice-president of this defendant, and one J. J. Franklin, who was then the treasurer of this defendant, purchased of one M. S. Carter the roadbed of what was theretofore known as the 'Fort Scott, Humboldt & Western Railroad Company,' in the counties of Bourbon and Allen in the state of Kansas, the same consisting of some grading which had been done some ten years prior thereto on a contemplated line of railroad between Fort Scott and Humboldt, but which had long been abandoned, the plaintiff, said Ayers, and Franklin, paying to said Carter therefor the sum of fifteen thousand dollars, which was the full value thereof; that on January 13, 1881, at a time when this defendant was greatly indebted beyond its ability to pay, and when very little, if any, of its line of railroad, had been constructed, the plaintiff and said Ayers wrongfully, fraudulently, and in utter disregard of the duties which, as officers and directors of this defendant, they owed to it, and by collusion with their associate officers and directors, and in fraud of the rights of this defendant, its stockholders, bondholders, and creditors, the public, and the state of Kansas, procured their said associate officers and directors to purchase of them the said roadbed so purchased of said Carter; the plaintiff and said Ayers having previously, on November 12, 1880, procured the passage of a resolution to that effect at a meeting of the board of directors of this defendant, at which the plaintiff and said Ayers were present, and in which they participated and voted in favor of said resolution. As the purchase price of said roadbed, the plaintiff, said Ayers, and Franklin procured to be paid to themselves of the moneys of this defendant the sum of two hundred thousand dollars, the same having been finally paid to them June 12, 1882. In addition to the said sum of money so paid to them as aforesaid, the plaintiff, said Ayers, and Franklin, procured to be issued to themselves three million six hundred thousand dollars of the capital stock of this defendant; the plaintiff receiving as his share of the money so paid the sum of sixty-six thousand six hundred and sixty-six dollars, sixty-six and two-thirds cents, and of the capital stock of this defendant the sum of one million two hundred thousand dollars. This defendant received no other consideration for said sum of money so procured by said parties to be paid to themselves, and the capital stock of this defendant, so procured by them to be issued to themselves, than the said roadbed so purchased by them of said Carter. This defendant further says that its capital stock, at the time it was so procured by the said parties to be issued to themselves, was of the value of one hundred cents on the dollar. Wherefore defendant prays judgment against the plaintiff for

the value of said money and capital stock, in the sum of three million eight hundred thousand dollars. Wherefore upon all causes of action hereinbefore stated in favor of the defendant and against the plaintiff, the defendant prays judgment against the plaintiff for the sum of three million eight hundred and four thousand six hundred dollars and ninety-five cents, (\$3,804,600.95.)"

Afterwards, and within the time required by law, the plaintiff filed his reply to defendant's answer, in words and figures as follows, to-wit:

"REPLY.

"The said plaintiff, for reply to defenses number 1 and 2, in defendant's answer herein, says that he denies each and every allegation therein contained. For reply to defendant's answer number 4, filed herein, plaintiff denies each and every allegation therein, except as herein specifically admitted, and plaintiff says that he and A. M. Ayers and J. J. Franklin were the owners of the roadbed and old grade of the Fort Scott, Humboldt & Western Railroad Company prior to the organization of this defendant railroad company; that, upon the organization of this present railroad company, defendant herein, it was found desirable and necessary by it for the success of this defendant corporation in building its proposed line of railway, to acquire said roadbed of the Fort Scott, Humboldt & Western Railroad Company, and upon a fair and full presentation of all the facts in the case to the board of directors of this defendant, and without any fraud or collusion, or underhand proceeding whatever this plaintiff and his associates did sell the same to the railroad company, this defendant, for the notes of this defendant in the sum of two hundred thousand dollars, and for a majority of the stock of this defendant company to the nominal amount of its face value of three million six hundred thousand dollars; that said notes at that time had no value whatever, and only could become of any value upon the success of the railroad company in building its road; the said stock had no value at the time of said sale, and has no market value now, and never had any value except for the purpose of securing the control of the railroad of the defendant; that only a portion of said notes have ever been paid; that said company, this defendant, only paid a fair price for said old roadbed, and the transaction was a fair and valid one in all respects, and was known to, and ratified, and affirmed by all the stockholders of the defendant corporation. And for a further reply to said answer number 4, this plaintiff says that more than two years have elapsed since said transaction up to the bringing

of this suit. And for a further reply this plaintiff says that more than three years have elapsed between said transaction and the bringing of this action. And for reply to the third defense set up in defendant's answer, plaintiff says that he denies that the payment therein admitted and set forth was the unauthorized and mistaken act of the officers of this defendant, but was a duly authorized payment on account by this defendant to this plaintiff upon account, and for the purpose of being so applied, upon a due presentation of an account for services made by this plaintiff upon the defendant. Wherefore plaintiff demands judgment as in his petition."

Afterwards defendant filed a denial of plaintiff's reply, in words and figures as follows, to-wit:

DENIAL OF PLAINTIFF'S REPLY.

"Defendant, with reference to plaintiff's reply to count number 4 of defendant's answer, denies all, each and every allegation in said reply contained, save and except in so far as the same are admissions of the allegations of said count number 4, and of defendant's right to recover of plaintiff for the cause of action therein stated."

On October 5, 1885, the defendant, by leave of court, filed an amendment to its answer, which is as follows:

"AMENDMENT TO ANSWER.

"(1) Defendant, by leave of court, first had and obtained, files this, its amendment to its answer herein, and says the defendant signed the articles of incorporation of the defendant, and became a director thereof, on the nineteenth day of January, 1880, and from that time, up to the time of filing said answer, continuously remained and acted as a director of the defendant. (2) That the plaintiff, Ayers and said Franklin, paid M. S. Carter the \$15,000 for the roadbed of the Fort Scott, Humboldt & Western Railroad out of the moneys belonging to this defendant."

The cause was tried at the September term, 1885, by the court, without a jury, by agreement of parties, upon the pleadings as hereinbefore set forth. The court decided the issues in favor of the plaintiff, and rendered a judgment in his favor, the journal entry of which is as follows:

"JOURNAL OF THE DISTRICT COURT OF BOURBON COUNTY, KANSAS, OCTOBER 5, 1885.

"*Francis Tiernan, Plaintiff, vs. St. Louis, Fort Scott & Wichita Railroad Company, Defendant.*

"Now, at this day, this cause came on for hearing and trial by the court, both parties waiving the intervention of the jury. The plaintiff appeared by E. M. Hulett and J. D.

McCleverty, his attorneys, and the defendant by J. H. Richards, A. A. Harris and J. H. Sallee, its attorneys, and the court, having heard the evidence and arguments of counsel, and considered of the same, finds upon the issues joined herein, in favor of the plaintiff, and against the defendant, and that the plaintiff is entitled, in accordance with the allegations and prayer of his petition, to have the note sued on reformed as prayed for, and for judgment upon both counts of said petition. It is, therefore, by the court considered, ordered and adjudged, that said plaintiff have and recover of and from the said defendant the sum of twenty thousand and one dollars and fifty cents, and his costs, to be taxed herein; and execution is awarded therefor. It is further ordered that of said judgment the sum of thirteen thousand six hundred and fifty-three and 30-100 dollars shall bear interest at the rate of ten per cent. per annum, and the sum of six thousand three hundred and forty-seven and 20-100 dollars shall bear interest at the rate of seven per cent. per annum. To said finding and judgment, and to each and every part thereof, the defendant duly excepted and excepts."

On the same day, to-wit, October 5, 1885, the defendant filed its motion for a new trial of said case, which is in words and figures as follows, to-wit:

"MOTION FOR NEW TRIAL.

"Now comes the defendant and moves the court to set aside the judgment rendered herein, and to grant a new trial in this action, for reasons as follows: (1) The said judgment and decision is contrary to law. (2) The said judgment and decision is not sustained by sufficient evidence. (3) Errors of law in the rejection and reception of testimony, prejudicial to the defendant, occurring at the trial, and excepted to by the defendant at the time."

And thereupon, on the same day, to-wit, October 5, 1885, the said motion for a new trial coming on to be heard, the court overruled and denied it; and the journal entry overruling said motion is as follows, to-wit:

"JOURNAL OF THE DISTRICT COURT OF BOURBON COUNTY,
KANSAS, OCTOBER 5, 1885.

"*Francis Tiernan, Plaintiff, vs. St. Louis, Fort Scott & Wichita Railroad Company, Defendant.*

"Now, on this fifth day of October, this cause came on to be heard on the motion of defendant for a rehearing and a new trial of this action, and the court, after having heard the arguments of counsel, and being fully advised in the premises, does overrule and deny said motion, to which ruling of the court the defendant duly excepted and excepts. And

thereupon, on motion of the defendant, sixty days are given defendant to make and serve on plaintiff's counsel a case made for the supreme court, and ten days thereafter are granted to plaintiff's counsel to make and serve on defendant's counsel amendments thereto, and five days thereafter are granted to defendant to present said case to the judge of this court for signing, settlement and allowance."

J. H. Richards, A. A. Harris and J. H. Sallee for plaintiff in error.

J. D. McCleverty and E. M. Hulett for defendant in error.

SIMPSON, C.—The investigation of the important questions involved in this case has been much lightened and expedited by the very careful and judicious preparation of the cause for review in this court. The record of the case made is printed in large, clear type, supplied with a thorough and admirable index; the documentary evidence arrayed in the natural order for examination; and, in a word, everything has been done to lessen the labor of the court, and to render its discharge of duty easy and pleasant. We express the obligation of the court to counsel for plaintiff in error, for their care and skill in the preparation of the case for review here. Counsel on both sides have exhausted the sources of information on the legal questions involved, and left to the court nothing to complain of in this regard. Condensing the documentary and oral evidence into a brief summary, and reciting them in chronological order, the material facts are as follows: The note sued upon by the plaintiff below was executed by the president of the railroad company, and

Facts.

it was claimed that this was done in pursuance of a resolution of the board of directors, adopted at a meeting held on the tenth day of March, 1882. The authority of the president to execute the note is denied by a verified answer. As this is one of the most vigorously contested questions in the case, we pass it for the present.

The balance of the plaintiff's demand against the railroad company consisted of a claim for salary as president and general manager from March 7, 1882, to March 7, 1884, at an established rate of \$5,000 per year; and about this part of the claim there does not seem to be much controversy. The answer of the defendant below alleges that Tiernan and Ayers were promoters, incorporators, and directors of the railroad company, and that Tiernan was its president and active manager; that, while acting in that capacity, he and Ayers, on the twelfth January, 1881, purchased from one M. S. Carter a roadbed of a defunct railroad corporation, extending from Fort Scott to Humboldt, at its full value, for \$15,000, and then,

in collusion with other certain officers and directors of the St. Louis, Fort Scott & Wichita Railroad Company, sold it to that company for the sum of \$200,000 cash, or its equivalent, and \$3,600,000 of the capital stock of said company; that this was done in violation of their obligations and duties as officers of said railroad company; that the stock was of par value,—and pray a judgment against Tiernan for \$3,804,600.95.

For some years before the organization of the St. Louis, Fort Scott & Wichita Railroad Company, there had been graded a roadbed, with some bridges built on it, from Fort Scott to a little distance beyond Humboldt, by an organization known as the "Fort Scott, Humboldt & Western Railroad Company." The length of this roadbed was about 44 miles. The company that had graded the roadbed and built the bridges had failed, and one M. S. Carter had foreclosed a mortgage against it, and bid in its property, consisting of the roadbed and bridges, and had become the absolute owner. On the seventeenth day of February, 1880, Carter sold this roadbed to Francis Tiernan and Alexander M. Ayers, together with all maps and profiles in the possession or in the control of Carter, of said line of road between Fort Scott and Humboldt, and thence westward, or south-westward through the state of Kansas. The consideration of this sale was the sum of \$15,000, to be paid as follows: \$1,000 within 90 days, and \$14,000 within one year, and the additional agreement that the said Tiernan and Ayers were to commence within 30 days to procure the unsecured right of way over which the said roadbed or line of railroad was originally surveyed, established, and partially graded; and all deeds and contracts for the right of way, side tracks, and switches, depot grounds, tanks, and stock-yards were to be taken in the name of M. S. Carter, and were to inure to his benefit, and to be absolutely his, until Tiernan and Ayers paid in accordance with the terms herein specified; and Tiernan and Ayers agreed that within 90 days they would use their best endeavors to secure aid to said road, by procuring bonds to be voted by the various municipalities through which said line would pass, in Bourbon and Allen counties, and that all such aid procured in the construction of a railroad from Fort Scott to Humboldt, should accrue to the benefit of Carter and become his property, if they should fail to pay him as specified. The terms of this agreement were reduced to writing, and signed by the parties, on the seventeenth day of February, 1880. The first one thousand dollars was paid on the fourteenth of May following. On the twenty-third day of February, 1880, the charter of the St. Louis, Fort Scott & Wichita Railroad Company was filed in the office of the secretary of state. It was signed and ac-

knowledge by Francis Tiernan and Alexander M. Ayers, in Champaign county, Illinois, on the twentieth day of January, 1880. On the twentieth day of February, 1880, the company was organized at Fort Scott by the election of Francis Tiernan as president; Alexander M. Ayers as vice-president; and Ira D. Bronson as secretary. On the seventeenth day of April, 1880, Tiernan and Ayers sold to John J. Franklin, of Philadelphia, one-third interest in the roadbed known and called the "Fort Scott, Humboldt & Western Railroad," commencing at Fort Scott and running to Humboldt, estimated distance 44 miles, for the consideration of \$25,000. Of that amount \$5,000 was to be paid as soon as Franklin could examine the title and approve it, and the sum of \$20,000 to be paid within eight months. When Franklin paid the \$5,000 he was to be elected treasurer of the St. Louis, Fort Scott & Wichita Railroad Company.

Some time during the month of May, 1880, the St. Louis, Fort Scott & Wichita Railroad Company made an agreement to purchase the old roadbed of the Fort Scott, Humboldt & Western Company, and it is this agreement that is hereafter referred to in the minutes of the meeting of the directors of the St. Louis, Fort Scott & Wichita Railroad, held on November 12, 1880. On the twelfth day of November, 1880, the directors of the St. Louis, Fort Scott & Wichita Railroad adopted a resolution approving and confirming the contract of Tiernan, Ayers, and Franklin of the sale by them, and the purchase by the company, of the roadbed, etc., ordering the issue and delivery of the stock and the execution and delivery of orders for cash, or first mortgage bonds, as provided in the agreement of sale. On the third day of December, 1880, Franklin sold to Ira J. Bronson all his right, title, interest, and claim in and to the St. Louis, Fort Scott & Wichita Railroad Company, and the old roadbed, etc. On the sixth day of March, 1881, at a meeting of the stockholders of the St. Louis, Fort Scott & Wichita Railroad Company, the following resolution was adopted by a vote of all the stockholders present in its favor: "Be it resolved that all actions of the board of directors of the St. Louis, Fort Scott & Wichita Railroad Company, in relation to selling and disposing of the capital stock of said railroad, and receiving payment therefor in the manner and kind in which such payments were made, be, and they are hereby, approved and ratified." The roadbed was paid for by issuing to Francis Tiernan, Alexander M. Ayers, and Ira J. Bronson, or his assignee, each \$1,200,000 of paid-up capital stock, and an order on the railroad company in favor of each one of these persons for \$66,666.66½ in cash, or first mortgage bonds; but the order for cash or

bonds was in no manner to become a lien on that part of the road running from Fort Scott to a point where it crosses the Kansas City, Lawrence & Southern Kansas Railroad in Allen county. At the time of these various transactions about the old roadbed, there had been no amount of the capital stock of the railroad company issued, the first being issued to one L. M. Bates of New York, in December, 1880. Bates was an assignee of Ira J. Bronson, for a part of Bronson's share of the stock of the purchase of the roadbed.

On this state of facts, supplemented by the other acts of the parties that will be noticed hereafter, the contention of counsel for plaintiff in error is: *First.* Tiernan was president, general manager, and chairman of the executive committee for two years, during which time no agreement existed whereby he was to be paid for his services; and, at the end of that time, he and his associate directors could not legally vote him a salary for services theretofore rendered. *Second.* Ayers, Bronson, and Hill were, respectively, vice-president, secretary, and superintendent of the company during the time Tiernan was president. No contract or agreement had been made whereby they were to be paid a salary, nor no resolution or by-law had been adopted to that effect. At a meeting of the directors, at which Tiernan, Ayers, Hill, Bronson, and another, who was a subordinate officer of the company, only were present, and no notice of the meeting had been given to the absent directors, a resolution could not be legally adopted allowing salaries to Ayers, Bronson, and Hill for services theretofore rendered, and authorizing the execution of the company's notes therefor. *Third.* The by-laws of the company, adopted by the stockholders at meeting regularly called for that purpose, provided the manner in which the company's notes should be executed, and persons who were both stockholders and directors, and who had favored the adoption of such by-laws, could not ignore them, and procure the company's notes to be executed to themselves, in a manner different from that prescribed in the by-laws. *Fourth.* Tiernan and Ayers, occupying the positions hereinbefore recited, bought in an old roadbed that the company needed for \$15,000, and for the purpose and with the intention of selling it to the company, with an agreement among themselves, Bronson, and Hill, to divide the profits of the transactions, sold it to the company for \$200,000 cash and \$3,600,000 of the company's capital stock, and then carried out their agreement about the division of profits. The company is entitled to recover of Tiernan the difference between the price paid by him and Ayers for the roadbed and that at which they sold it to the company. *Fifth.* Tiernan and Ayers did not disclose to any

of their associate directors, except Bronson and Hill, the price paid by them for the roadbed, and the other five directors had no knowledge on that subject. Such a transaction will not be upheld when it is challenged in a proper action by the company. *Sixth.* Tiernan took \$3,600,000 of the company's capital stock in the manner above set forth, and in a proper action by the company he is answerable to it for the par value of the stock, and that judgment should be rendered against him accordingly. *Seventh.* Tiernan was a director from the time of the organization of the company down to the time of the commencement of the action to recover for the matters hereinbefore referred to. And as, during all that time, he was trustee for the company, statutes of limitation did not commence to run as long as that relation continued.

Contention as to the Note.—Numerous questions arose on the pleadings and at the trial, with reference to the authority of the board of directors of the railroad company to execute the \$10,000 note set forth as the first clause of action in the petition of the plaintiff below, and they are as follows:

First. It is claimed that after services had been performed by Tiernan as president of the company, without any express agreement as to their value and payment, the board of directors could not legally vote him a salary for past services. We do not think this objection fairly states the facts in this particular case, for this reason: that there is in the record some evidence tending to show that there was a common understanding among those persons who were actively engaged in the work of the company, that they were to receive compensation for such services. It is true that the record does not disclose any affirmative action by the governing body of the company, at the commencement of these services, or for a long time thereafter, declaring a liability and providing a measure of compensation in respect to them, but the fact remains that they all went to work with a common understanding that if their united efforts were successful, and anything substantial resulted from their labors, fair pay for labor performed would follow. It must be recollected that the only capital this railroad company possessed at its birth, and in its earlier struggles for existence, was the energy and capacity of Tiernan, Ayers, Bronson, and Hill. They necessarily reserved the question of compensation for the future to be settled and determined by the success attained; for, without their labors resulted in the construction and equipment of a railroad, there would be no revenue produced sufficient to pay expenses or salaries. If their projected road became an accomplished fact, the measure of compensation was to be de-

Power of directors to vote salary for past services.

terminated by the degree of success. If there is any one thing more manifest in the record than all others, it is the tireless energy and wonderful management of these four men in the organization of the company, and the success of the enterprise. It may be fairly said that the resolution of the board of directors of the company, passed on the tenth day of March, 1882, allowing salaries to the persons therein named, was but expressive of the common understanding had at the commencement of the work, that they were to be paid a reasonable compensation for services rendered, whenever the success of the enterprise justified the payment.

This case differs from that of First Nat. Bank of Ft. Scott v. Drake, 29 Kan. 311, 1 Am. & Eng. Corp. Cas. 210, in this respect, for in the reported case it was claimed on the part of the bank that when Drake was appointed cashier he had agreed to act without compensation. He was a large stockholder; he was allowed room in which to transact his private business, and space in the safe of the bank in which to deposit his valuable private papers; and because he owned a large share of the stock, and was allowed these other privileges and facilities for the transaction of his private business, he assumed the duties of cashier without other compensation. It is said in that case, (page 330:) "As this case goes back for a new trial, we desire to add, to guard against any misconception, that we do not agree with all the authorities heretofore cited as to the lack of power on the part of the directors to appropriate money in payment of the salary of the cashier or other officers, after the services have been rendered; and in cases where such cashier or other officer happens to be a director, we think the rule is, in the absence of positive restrictions, that an executive officer like that of cashier is entitled to reasonable compensation for his services, and that the directors have power to fix the salary after the expiration of the term of office, and this, though the appointee is also a director, and continues to be such, while holding the independent office." We conclude, therefore, that the board of directors had the power to pass the resolution of the tenth March, 1882, for the reason that it only expressed a previous agreement, and that they had the right to award reasonable compensation to an officer for services performed, after they had been rendered. It is not necessary, in view of the fact that there is ample testimony in the record to establish the common understanding existing as to compensation, to sustain our ruling in the case by that of the Drake case. The writer of this opinion has serious doubts as to the application of the rule in that case to the facts here presented, and is very decided in his conviction that such a

rule can only be supported with reference to a class of appointive officers who have no control over the management and disposition of the property of a corporation. It is very clear that the learned judge who delivered the opinion in the Drake Case, and had considered all the cases now cited, had the distinction between managing and controlling officers and ministerial ones in mind, and that his remarks were made with reference to that distinction.

Second. It is insisted by counsel for plaintiff in error that the resolution of the board did not authorize the execution and delivery of a note of \$10,000 to Tiernan for his services.

The answer of the company denied the authority of its officers to execute the note sued upon. The answer was supported by an affidavit, and, while

this raised the other question disposed of above, this question still remains. The minutes of the proceedings of the directors' meeting held on the tenth day of March, 1882, recite that "whereas the salaries of A. M. Ayers, president, F. Tiernan, vice-president and general manager, J. D. Hill, superintendent, and Ira J. Bronson, secretary and treasurer, not having been heretofore fixed, therefore it is resolved that the salaries of each of said officers be and the same are now fixed at \$5,000 per annum, from the fourth day of March, 1881, to March 7, 1882;" and "whereas, there is due F. Tiernan, \$5,000 on said salary," etc., and "whereas, this railroad company is now unable to pay such salary, therefore be it resolved that the railroad company, by its president and secretary, at once execute and deliver its promissory note for the amount herein specified." Then follows a resolution pledging some Eureka township bonds to secure the payment of the note, but these are not material. It was under and by virtue of the authority of this resolution that the \$10,000 note sued upon was executed. The plaintiff below claimed that the record of the minutes, when rightfully understood, would show the amount recited to be due Tiernan as \$10,000, instead of \$5,000; that the intention of all present and participating in the meeting was to authorize the execution of a \$10,000 note, and that the record originally read \$10,000, but had been changed to \$5,000. They introduced the testimony of several witnesses upon this question, over the objection of the railroad company, and may fairly be said to have established this state of facts: that the original proceedings of the meeting were noted on loose sheets of paper, and afterwards transcribed from those loose sheets onto the record-book, and the explanatory evidence consisted of a book called the record of "Bills Payable," in which was recited the notes executed by the railroad company. These recitals were made

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deliver note.

up by the direction of Bronson, the treasurer, the entries being made a short time after the notes were executed. This book showed under the date of March 10, 1882: "Time, 180 days." Drawer, "The St. Louis, Fort Scott & Wichita Railroad Company," in favor of "Francis Tiernan." Where payable, "The First National Bank of Fort Scott." Due, "September 6, 1882." Amount, "\$10,000." Bronson testified that he had in his possession the original short notes of the proceedings of the meetings, made on the day it was held, and as the transaction occurred. They read as follows, "March 10, 1882, board convened pursuant to adjournment. Present same as yesterday. Motion by Hill as to Malin bonds carried. Motion for salaries \$5,000 per annum. Motion as to note 180 days and Eureka bonds carried." Bronson produces a second paper, identifies it as his handwriting, but does not give a very satisfactory account of its origin. The contents of this paper are substantially those of the first, except that the proceedings of the meeting are in greater detail. In this paper there is the statement that there is due Tiernan on his salary, the sum of \$10,000. It was first inserted in figures \$5,000, and that is crossed out by parallel lines being drawn over it with a pen, and followed by the figures, \$10,000. Herrick, a clerk of Bronson's, who transcribed the minutes from these loose papers into the record-book, testifies that he had first written, "whereas there is due Tiernan on his salary, \$10,000," and had subsequently erased \$10,000, and written \$5,000, but that he had no recollection positively why the change was made, and that the erasure could be seen from the under side by looking through the leaf. Hill, who introduced the resolution about the salaries, testified that the object and purport of the resolution was to fix the salaries of these officers at \$5,000 per annum for each year, for all the time past, and all the time to come in the future.

This is enough of the evidence to show the character of the objection to its introduction made by the railroad company. This object is twofold. In one of its features it is technical, being confined to the admissibility of parol evidence to vary, contradict, or impeach the record. The other feature goes to the authority of the board of directors to execute the notes of the company except in the manner and under the conditions prescribed in its by-laws. On the first feature or reason given to sustain the objection, we think reason and authority alike concur in affirming the ruling of the trial court. That parol testimony is admissible for the purpose for which it was issued in this case, is manifest from the decision of this court in the case of *Troy v. Atchison &*

N. R. Co., 11 Kan. 519; and this on the theory most favorable to the plaintiff in error—that the record book absolutely stated that the amount due was \$5,000.

The precise contention here is, what did the record say,—\$5,000 or \$10,000? Herrick says that it was first written \$10,000, and then changed to \$5,000, and this leaves the question as to what are the facts an open one. Official bodies, such as the board of directors of a railroad company, have the same right as courts of record to make their journals speak the truth; or, if a question arises as to just what facts the record does state where it contains erasures and interlineations, what did transpire, and was attempted to be recorded, can be established, to aid in the construction of the recitations on the record. We are not disposed to disturb the finding of the trial court in this respect, necessarily included in the general judgment rendered in favor of the plaintiff below, because it seems to have been amply justified by the evidence introduced, and this evidence is reinforced by the strongly suggestive fact that on the very day that this resolution was adopted, the note was executed for \$10,000.

The other ground of objection can be stated in a few words. A by-law of the company adopted at a meeting of the stockholders, provided: "If cases arise in which it may become necessary to issue the notes of the company, instead of its acceptances, such shall be drawn by the auditor, to the president, or vice president, countersigned by the treasurer, and a proper record made of their maturity by the latter officer." Who shall determine, when it shall become necessary to issue the notes of the company, but the governing body,—the board of directors? Then the objection goes, not to the authority of the board, but the mere form of the note. It is objected to because not drawn in accordance with the requirements of the by-laws. It is in effect, saying, we will not pay this paper because it is not in exact accordance with the form we have prescribed for our notes. We suppose that in the absence of any by-law prescribing the form, or authorizing the issuance of promissory notes of the corporation, if it become necessary in the transaction of the ordinary business of the company, the president, by the order of the board of directors, could execute the promissory note of the corporation for a valuable consideration, and as this objection is clearly technical, and goes to the form, and not to the substance, it ought not to be allowed to bar a recovery. The execution of the note is the act of the company, done in pursuance of an order made at a meeting of its directors, made in accordance with an agreement between its creditors and the company, delivered because the company had not the

money to pay for services rendered, and for which payment was due and ought to have been made; and the company ought not now to be allowed to say we will not pay this company's note because it is not drawn in strict conformity to the company's by-laws. Even a cursory glance at the two authorities cited by counsel, (*Samuel v. Holladay*, 1 Woolw. (U. S.) 400; *Charitable Corp. v. Sutton*, 2 Atk. 400,) ought to have satisfied them that in those cases the court was considering matters of substance, and not of form. The question as to whether the facts existed that authorized the officers of a railroad company to execute its notes, is a different question from whether the notes are in the exact form prescribed in the by-laws or not. The first determines the existence of the notes; the other concedes the right to issue, but insists on a certain prescribed form. In *Samuel v. Holladay*, 1 Woolw. (U. S.) 400, the question was whether or not a deed of trust was void, because the meeting of directors at which it was executed was held without the notice prescribed for such meeting by the by-laws of the company. In *Charitable Corp. v. Sutton*, 2 Atk. 400, the officers of the company lent money on pledges, repealed loans on the same pledges, and on imaginary pledges, in violation of the by-laws.

Third. Another error assigned and urged for reversal is this: The court admitted the note to go to the jury when only the signature of the officers executing it had been proved, and this was done over the objection of the plaintiff in error. The authority of the officers of the company who had executed the note to make it was put in issue by the sworn answer of the company; and, under the state of the pleadings at the time of the trial, some preliminary proof of the authority of the officers to execute the note should have been given, before it could be permitted to be read. If this ruling stood alone, isolated from the other facts, and rulings of the court, it could not be sustained; but the error was subsequently cured by the admission of the parol and other evidence heretofore noticed, tending to show the power of the officers under the resolution adopted at the meeting on the tenth March, 1882, and hence the ruling complained of does not operate to the prejudice of the plaintiff in error.

Authority of
officers to ex-
ecute note.

This disposes of the first three contentions of the plaintiff in error.

As to the two years' salary.—Counsel for the plaintiff in error does not indulge in a very lengthy controversy about the two years' salary that constitutes the second cause of action in the petition of the plaintiff below, but what is said may be resolved into these two objections:

First. The resolution adopted by the board of directors at the meeting held on the tenth March, 1882, did not fix the salary for the future.

Second. The payments made thereon, made by the auditor of the company, were without authority, and did not bind the company to make any further payments.

The proper solution of the first objection depends upon the construction to be given the resolution of the tenth of March, 1882. Construing it in the light of the testimony of its author, and it appears that it was intended to fix the salary at \$5,000 per annum, for the past and for the future, and in the absence of all evidence it would seem that this was the natural inference from the words of the resolution. The salary is fixed at a definite sum per annum, and then, in view of all the other facts apparent on the face of this resolution, it is determined what is due for past services. Under and by virtue of this resolution, as it remained on the record of the proceedings of the board of directors, any person who had succeeded Tiernan in the office could have reasonably concluded that his salary was fixed at \$5,000 per annum. There does not seem to be any dispute but that Tiernan performed the services for the payment of which he seeks to recover, and as the record discloses that about this time he sold out all the stock he had, and the others ceased to have any connection with the company, Tiernan could certainly recover the value of services performed at the rate established by the resolution, without there is some affirmative showing of a different agreement.

A very short statement will dispose of the second objection. Tiernan was performing the duties of president and general manager of the railroad company from March 7, 1872, to March 7, 1874. During this time he was paid in cash and articles prescribed, the sum of \$4,600.95. These payments were made by the auditor of the company, the last one of \$3,000, cash, being made on the twenty-first day of October, 1884, at a time long subsequent to the performance of the services. This payment was made by the order of one Miller, who was then vice president and general manager of the company, who gives the reasons that prompted the payment, in his testimony. A part payment is an admission of some liability. We think that the officers of the company, under the facts heretofore stated with reference to the resolution of the board of directors, had authority to make the payment, and that Tiernan is entitled to recover the balance due.

As to the roadbed.—(1) Some very important questions grow out of the purchase of the roadbed by Tiernan and his associates, and their sale of it to the railroad company. It is

alleged in the answer of the railroad company that, at the time the purchase was made, Tiernan was one of the incorporators and directors of the company, and occupied such a position towards the company, that whatever dealings he had respecting the roadbed, resulted to the benefit of the corporation; or, if this is not so, then if he made the sale to the company while acting in the capacity of president and director, he was bound to disclose the price he paid; the profit he was making; and that the whole transaction must be characterized by fair, open, and unmistakable candor in all its features. The first question we shall discuss is, were the defendants in error, Tiernan and Ayres, corporate fiduciaries, at the time they purchased the roadbed? They signed and acknowledged the charter of the St. Louis, Fort Scott & Wichita Railroad Company on the twentieth day of January, 1880, at Campaign county, state of Illinois. It was filed with the secretary of state on the twenty-third day of February, 1880. The contract of purchase of the roadbed was made on the seventeenth day of February, 1880. It thus appears that the roadbed was purchased before the railroad company had any existence. Section 10, chap. 23, Comp. Laws Kan. (Dass.) 1885, (being the act concerning private corporations,) is as follows: "Section 10. The existence of the corporation shall date from the time of filing the charter and the certificate of the secretary of state shall be evidence of the time of such filing." This express statutory declaration determines the fact that the railroad company had no existence prior to the twenty-third day of February. Important legal consequences flow from this determination. The legislature has prescribed the act that gives life to a corporation, and the date of the performance of that act is the birthday of its creation. From the moment of the filing of the charter with the secretary of state, the duties and obligations of those named as its first directors began. There could not have existed any fiduciary relations before that time, because there was no corporation in existence to create them. It is clear, then, that at the time they made the purchase of the roadbed, they were not directors, and did not occupy such a relation of confidence and trust to this railroad company, that this purchase was presumably for its benefit, or, by operation of law, resulted in its favor. All such theories and considerations are swept out of our pathway by the vigorous terms of the statute.

It is sometimes the case that parties who are dealing with each other about the organization of a corporation make such declarations, or give such pledges respecting its future creation, that causes of action arise between them that must be

Sale of road-
bed—Fiducia-
ry relation.

settled in accordance with the recognized rules of law, with reference to contracts, agency, or partnership. There is nothing developed in the record that justifies the assertion that such causes of action arose against Tiernan and his associates on behalf of others who participated in the organization. We do not believe that any one would seriously contend for a single moment that there is such a statement of facts in the record that if Tiernan had refused to sell his roadbed to the railroad company it could have enforced the sale. To make him responsible in this action there must be an affirmative showing that at the time he made the purchase he was either acting for and on behalf of the company, or that he so assumed to act, or that he occupied such a relation of trust and confidence with respect to the company that his purchase resulted to its benefit, and not to his own profit. The first we regard as impossible, because at that time the company had no existence, and hence he could not have acted on its behalf or authority, and for the same reason he could not have assumed to act for a corporation when there was none in being.

(2) It is alleged in the answer of the railroad company that Tiernan was a promoter of the railroad company, and the same statement is repeated in the briefs with italicized vigor, and great stress seems to be laid upon the assumed fact. This word promoter had its origin in the methods by which joint-stock companies were formed in England, where by law they were declared partnerships. Subsequently, when the era of railroad building began in that country, the business of promoting the organization of such companies assumed definite form. The ordinary proceeding was this: The promoter introduces the enterprise to the notice of persons of wealth in the locality through which the line of the road is proposed to be located, informing them of its nature and prospects, furnishing an estimate of its probable cost. These persons were solicited to aid by their influence or subscriptions, or both. Enough persons were secured to constitute a provisional committee, and then this committee appoints from their number a managing committee, who issue a prospectus, announcing the nature and probable profits of the scheme, the proposed means to carry it out, the amount of capital required, the number and price of shares, and other details, to which is generally attached the names of the promoters, with references to the names of those persons constituting the provisional committees. If all this resulted in fair probabilities of success, application was then made to parliament for a bill of incorporation. If the scheme failed, the expenses incurred gave rise to litigation, and many questions as to the liability of these committees and of the promoters

were determined. If the incorporation was secured by the action of parliament, then another class of questions arose as to what acts of the promoters could be ratified by, and what acts resulted to the benefit of, the incorporation, and many others growing out of the condition of affairs. That has no resemblance to our method of organizing corporations. It is true that the word has been found to have its uses in our jurisprudence, but in a much more restricted sense than that used in the English reports.

The American cases upon this subject are not very numerous and most all of them will be found in 16 Am. Law Rev. 671, and in 1 Mor. Corp. 545. Assuming that a promoter is a person who organizes a corporation, and that he intends to sell its property, or to subscribe for its stock, or to take an active part in its management and business, let us inquire if there are sufficient facts recited in this record to determine that the fiduciary relation of promoter of this corporation was ever assumed by Tiernan, or if his acts in respect to its organization were such that a relation of this character could fairly be inferred. To start on, there is not one single word of parol testimony that can be fairly said to authorize an inference that Tiernan was the promoter of the corporation. It does not appear that he ever advised or suggested the organization of the company. In the next place, there is nothing in very many voluminous written instruments in the record that justifies any such inference. The charter itself would seem to rebut any such conclusion, so far as Tiernan was concerned, as it was signed and acknowledged by him in the state of Illinois. There is nothing to justify the allegation in the answer of the railroad company, or the assumption of its counsel in their briefs, that Tiernan was a promoter of the company. There is, in the written agreement between Tiernan, Ayers, and Franklin, whereby a one-third interest in the roadbed purchased by them from Carter was sold to Franklin, an understanding on the part of Franklin that if Tiernan and Ayers wish to sell the roadbed to the St. Louis, Fort Scott & Wichita Railroad Company, Franklin will join in the conveyance of it to the company, if his share in the purchase money is not less than \$40,000; but this agreement was made on the seventh day of April, 1880, after the purchase by Tiernan and Ayers, and after the organization of the company, so that we cannot utilize this fact to establish a relation as existing before the railroad company had any corporate life. There is no evidence that Tiernan was a promoter.

(3) At the time of the sale of the roadbed to the railroad company Tiernan was part owner of the roadbed, and was a director and president of the railroad company; and hence

it is very properly said that the sale must be a fair, open one in all respects, the price paid by Tiernan and his associates must have been disclosed to the directors of the company, and the whole transaction must not only be for the evident interests of the company, but it must have been conducted in all its stages in the utmost good faith on the part of the directors, and with a complete knowledge of the time when the circumstances under which, and the exact amount paid by Tiernan, at the date of his purchase, to be relieved of that suspicion with which courts of justice universally regard a transaction in which the seller and the buyer is represented by one and the same person. It has been decided that a director is not prohibited from dealing with his company; he can sell them real estate or any other kind of property, but there are certain rules strictly applicable to him that do not operate upon a person entirely disconnected with the corporation, and these he must faithfully observe to make his contract of sale one that the law will uphold. *Omaha Hotel Co. v. Wade*, 97 U. S. 13; *Mor. Corp.* §§ 297, 521, 545; *Simons v. Vulcan Oil & Min. Co.*, 61 Pa. St. 202; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Parker v. Nickerson*, 137 Mass. 487.

It has been decided time and time again, that the owner of a mine, an oil well, or a valuable patent, can organize a corporate company to develop mineral, or oil, or to manufacture the patented article, take a very large amount of stock in payment of his mine, oil well, or patent, and trust to the value given the stock by the success of the corporation for payment of his labor and discovery. In this class of cases there is a mere transfer of the *status* of the mine, oil well, or patent. It ceases to be personal property, and becomes corporate property, and each individual interest, as well as that of the owner, discoverer, or patentee, is represented by shares of stock. It is now decided in this case that the owners of a graded railroad bed can sell the same to a railroad company whose officers and directors are composed of the same identical persons who own the roadbed, and issue the capital stock of the railroad company in payment thereof, at a time when those who sell the roadbed, and own and control the railroad corporation are the absolute owners of all the stock issued by the railroad company, and when the terms of sale and the issue of stock are matters of record on the books of the railroad company, and when this transaction occurs months before any other or additional stock is issued by the company; that parties owning an old railroad grade with culverts and some bridges erected thereon, and who organize, control, manage and own a railroad company, whose stock at the time of their

sue has no market, but only a nominal value, can transfer the railroad grade to the railroad company, and issue the stock of the company in payment therefor; they, and they alone, at that time, being the only persons interested in the roadbed, and in the railroad company. At the time of the sale of the railroad grade, or old roadbed, it was owned by Tiernan, Ayers, Bronson, and Hill, and they in fact constituted the railroad company. There were some other directors, but the evidence is that just sufficient stock was placed in the name of the other directors to authorize them to act as such, and this transfer was but temporary, and for that sole purpose. This sale was ratified by the directors of the railroad company, and subsequently by the stockholders; but directors, stockholders, and owners of the roadbed were one and the same persons. By this transaction the value of the roadbed was represented by the stock of the railroad company, instead of remaining as the personal estate of the owners. At the time of the sale, and when the board of directors ordered the issue of the obligations and stock of the company in payment of the purchase price of the roadbed, the record affirmatively shows that all the persons who had any interest of any kind or character whatever in the railroad company, except Bates, the assignee of part of Bronson's stock, were Tiernan, Ayers, Bronson and Hill. They owned the roadbed, they constituted the railroad company, they sold the roadbed to the railroad company, and took the stock of the railroad company in payment, at a time when witnesses on both sides concede that the stock had only a nominal value. The developments in this record abundantly show that the title to and possession of the roadbed was of great pecuniary benefit to the railroad company; it alone enabled the company to construct the first 50 miles of its road, and to make such a beginning that its future success and final accomplishment were assured. The record does not show that there has ever been any other stock issued by the railroad company, except small amounts to municipalities through whose territory the line was built, and that it is owned, managed, and controlled to-day by the amount of stock issued to pay for this roadbed.

Tiernan and his associates sold their stock to Gould, in August, 1882, for a consideration of \$100,000, so that now, so far as it appears, the value of the stock issued representing a completed road 150 miles in length is much less than the actual cost of the roadbed. The railroad company in this action represents this stock, and it seeks to retain it. It has the use and enjoyment of the roadbed, and wants to recover from Tiernan the par value of the stock, being the sum of \$3,600,000.

It is useless to pursue the discussion further, as it is not

controlled or governed or affected in any degree by those self-evident equitable principles and unyielding rules of law that govern in all cases where persons sustain fiduciary relations to corporations, or to other persons, by reason of their being representatives of their pecuniary interests. This case involves the proposition as to whether or not the absolute owners of property can, when it seems to them to be to their profit, so change the relation of their property as to make it stock in a corporation. Whoever succeeded to the rights of Tiernan and his associates as the holders of the stock, did so with all the facts showing the sale and purchase of the roadbed and the issue of the obligations and stock of the railroad company spread upon its record, and have now no right to complain, however different the case might be if they had then an interest in the corporation. This same issue, in its most important features, has very recently been tried and decided by the circuit court of the United States for the district of Kansas, in the action of *Stewart v. Railroad Co.*, a manuscript opinion of Judge FOSTER's having been furnished us. Stewart brought his action to recover on several promissory notes issued by the railroad company, aggregating \$85,000. These notes constituted a part of the \$200,000 that was to be paid in cash, or its equivalent, for the roadbed, and a \$5,000 note issued to Hill for salary as general manager. The same defenses that are made here, were set up in that action. The circuit court rendered judgment for the full amount claimed by Stewart, overruled all the defenses, and discussed very many of the questions alluded to in this opinion, with the same result.

We see no material error in the record, and recommend that the judgment of the district court of Bourbon county be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

Compensation of Directors for Extra Services.—See *Fen Eyck v. Pontiac, O. & P. A. R. Co.* (Mich.), 37 Am. & Eng. R. Cas. 273, note, 277.

Compensation of Officers of Corporation.—See *Davis v. Memphis City R. Co.* (C. C.), 22 Am. & Eng. R. Cas. 1, note, 8; *Falkiner v. Grand Junction R. Co.* (Ont.), 16 *Id.* 591; *Detroit, H. & S. W. R. Co. v. Smith* (Mich.), 13 *Id.* 655; *Hutton v. West Cork R. Co.* (Eng.), 13 *Id.* 655, note, 4 *Id.* 307.

Fiduciary Relation and Responsibility of Promoters.—See *Pittsburgh Min. Co. v. Spooner* (Wis.), 24 Am. & Eng. Corp. Cas. 1, note, 16; *Lydney & W. Iron Ore Co. v. Bird* (Eng.), 24 *Id.* 23.

Power of Promoter to Bind Company.—See *Munson v. Syracuse, G. & C. R. Co.* (N. Y.), 29 Am. & Eng. R. Cas. 377; *Perry v. Little Rock & F. S. R. Co.* (Ark.), 25 *Id.* 44; *Braddock v. Philadelphia, M. & M. R. Co.* (N. J.), 16 *Id.* 436; *Little Rock & F. S. R. Co. v. Perry* (Ark.), 9 *Id.* 610, note, 629.

Meeting of Directors—Validity of Action at—Ratification.—If the acts of a board of directors at a special meeting are ratified at another special meeting subsequently called of which all the directors had sufficient notice

and at the next regular meeting the minutes of the two special meetings are read and approved, the acts of the directors at the first meeting are not invalidated by the fact that the members of the board were not properly notified of such meeting, in the absence of fraud or conspiracy on the part of the officers or directors. County Court of Taylor Co. *v.* Baltimore & O. R. Co., 35 Fed. Rep. 161.

Payment of Corporate Debts—Guarantee of Directors.—The fact that members of the board of directors had guaranteed further advances by the company's mortgagees after the company had exhausted its credit, which advances were to be paid by the delivery of stock, does not render illegal the action of the board of directors in delivering corporate stock in payment of a portion of the indebtedness, and consolidating the remainder into a mortgage on the corporate property. County Court of Taylor Co. *v.* Baltimore & O. R. Co., 35 Fed. Rep. 161.

BUDD,

v.

MULTNOMAH STREET R. CO.

(15 Or. 404.)

Franchise—Action for Unlawful Disturbance—Laches and Acquiescence.—Where a charter authorizing the construction of a street railway is granted in favor of A. "and such other person or persons or others as he may associate with himself therein," and A. thereupon organizes a corporation of which he acts as superintendent and director, and which expends money in constructing, equipping and operating the railroad, the acquiescence of A. in the construction and operation of the road and his acts as director and superintendent are sufficient to bar him from maintaining an action against the company for unlawful disturbance by it of his rights by operating the railroad to his exclusion, although he has made no written assignment of the franchise granted to him.

APPEAL from Circuit Court, Multnomah County.

H. T. Bingham and McDougall & Bower for appellants.

B. Killen and J. C. Moreland for respondents.

STRAHAN, J.—This is an action to recover damages against the defendant, at the rate of \$1,000 per month, from and after the twenty-third day of October, 1882, for the alleged unlawful disturbance, by the defendant, of the plaintiff, in the use and enjoyment of a certain franchise granted by the city of Portland to the plaintiff. The franchise set up in the complaint is the right and privilege to lay down

Case stated.

and maintain an iron railroad track or tracks, and to operate street railways within the city of Portland, upon certain streets mentioned in the ordinance making the grant. The grant is made to D. E. Budd, and such other person or persons as he may associate with himself therein. The complaint alleges compliance with the terms of the ordinance on the part of Budd. The manner of such compliance is fully alleged. It is stated that on or about June 14, 1882, this plaintiff and others duly incorporated themselves under the name of the Multnomah Street Railway Company, and, as such corporation, *they* purchased the materials, constructed a line of street railway in accordance with the terms of said ordinance No. 3,477, and in such manner as to comply with the terms and requirements of such ordinance; * * * "and thereafter they procured street-railway cars of the kind required by said ordinance, and placed them upon the lines of said railway, provided horses for drawing the same, and placed the said railway and cars in complete order and condition for operating the same, in the manner and subject to all the terms, restrictions, and conditions in said ordinance No. 3,477 contained and required; that the plaintiff procured the construction of said street railway, and the obtaining of said horses and purchase of said cars, as aforesaid, by the Multnomah Street Railway Company, but he never assigned the whole or any portion of said right and privilege granted to him by ordinance No. 3,477 to defendants; that plaintiff never assigned the whole or any portion of the franchise or privilege granted to him by said ordinance No. 3,477 aforesaid, nor has he even associated with him any person or persons whatever, in the use and enjoyment of the same; and ever since said June 12, 1882, he has been, and now is, the sole owner of said franchise, and of all the rights, privileges, and immunities lawfully pertaining thereto, or existing thereunder." It is then alleged, in substance, that on the twenty-third day of October, 1882, the plaintiff was the sole and exclusive owner of the right of carriage and conveyance of passengers thereon and over the same for hire in the railway cars aforesaid. Nevertheless the said defendants, the Multnomah Street Railway Company, not being the owner of said franchise and privilege, or of any interest therein, and not being associated with the plaintiff therein, but well knowing the premises, and contriving to disturb and injure the plaintiff in the peaceable and lawful enjoyment and use of his said franchise of operating said street railway, and carrying passengers thereon for hire, on the said twenty-third day of October, 1882, and continuously thereafter, ever since, to the present time, injuriously, unlawfully, and against the will of the plaintiff, has claimed the street

railway and cars and horses as its own, and has possessed itself, to the entire exclusion of plaintiff, of said street railway cars and horses, and has occupied by the said railway track, cars, and horses the portions of the streets aforesaid, upon which he has the right, as against the defendants, to maintain and operate a street railway, and has thereby prevented the plaintiff from maintaining and operating a street railway thereon as he otherwise could and would have done, and has carried and conveyed divers passengers for hire, over and upon said street railway heretofore mentioned and described, and continues so to do up to the present time; and that by reason thereof the plaintiff has been deprived of divers profits and emoluments, which would otherwise have arisen and accrued to him from the enjoyment of said franchise, and has been greatly disturbed in the possession thereof, and his right and title thereto, to his damage in the sum of \$1,000 per month from said twenty-third day of October, 1882. The prayer is for judgment against the defendant for the sum of \$1,000 per month, from said twenty-third day of October, 1882; "and for the possession of his franchise and privilege aforesaid," and for costs, etc.

This is the second appeal in this cause. When it was formerly here, it was upon a demurrer to the complaint, and this court then reversed the ruling of the court below sustaining the demurrer, and remanded the case for further proceedings. This court then said: "The main question presented by the demurrer was whether the appellant, when he incorporated with others under the name of the Multnomah Street Railway Company, necessarily made the company the grantee of the franchise, whereby he thereby *ipso facto* associated with himself therein the other persons so as to entitle them to the rights and privileges granted by the ordinance. Can the allegation in the complaint that the appellant had never associated with himself any person or persons whatever in the use and enjoyment of the franchise be true, in view of the fact that he and others incorporated themselves under said name, and that the corporation purchased material and constructed and equipped the railway as required by the ordinance by which the right was granted, and that the privilege of building the road, and equipping and operating it, with the right to exact fare for transporting passengers thereon, is a positive right, and has an identity distinct from the structure and equipage of which there can be no doubt? The appellant had the option, under the ordinance, to reserve the privilege to himself exclusively, or have it vest in himself or others whom he might associate with himself therein. He could have contracted with some construction company to build

and equip the road for him for a compensation to be paid therefor, and retained exclusive ownership of the franchise; or he could have associated with himself such company, and thereby admitted its members to a joint proprietorship in it. He alleges in his complaint that he adopted the former course, and whether that is true or not depended, in the opinion of this court, upon proof of facts. * * * I have made this long extract from the opinion for the reason it has not been published, and for the further reasons that it has become the law of the case, and, so far as the facts are the same, must govern on this appeal. When the case was returned to the court below, an answer was filed by the defendant, issues of fact being duly joined. The case was tried by the court without the intervention of a jury, which trial resulted in findings and judgment for the defendant, from which judgment this appeal is taken. No exceptions were taken upon the trial to the admission of evidence, and the case is here upon the questions of law arising on the findings.

So much of the findings of fact as are necessary to a proper understanding of the legal questions discussed are as follows:

"(2) That on the tenth day of July, 1882, said D. E. Budd, W. A. Scoggin, and E. J. Jeffrey entered into a mutual oral agreement, where it was mutually agreed and understood by each of said parties that said W. A. Scoggin and E. J. Jeffrey should join with said D.

Findings of fact.

E. Budd in the execution of the bond which said Budd was by ordinance required to file with the auditor of said city, and that said Budd and Scoggin and Jeffrey would thereupon join and associate together on equal terms, and exercise and use the franchise granted to said Budd and his associates by said ordinance, and together build and operate and own in common and in equal shares the street railroad contemplated and provided for by said ordinance; and thereupon, in pursuance of said agreement and understanding, said Scoggin and Jeffrey, on said tenth of July, 1882, did join said Budd in the execution of a bond conditioned as required by said ordinance, and the same was on said tenth of July, 1882, approved by the mayor of said city, and on the next day filed with the auditor of said city, along with the written acceptance of said Budd, of the terms and conditions of said ordinance as required thereby.

"(3) That on the thirteenth day of July, 1882, said D. E. Budd, W. A. Scoggin, and E. J. Jeffrey orally agreed with each other that they would form, or cause to be formed, a corporation, under the laws of Oregon, in which they would be equal owners of stock for the purpose of constructing and operating the railroad contemplated by said ordinance, and

of using the franchise granted thereby, and they did thereupon, on said thirteenth day of July, 1882, cause to be formed a corporation known as the 'Multnomah Street Railway Company,' the defendant herein, and said Budd, Scoggin, and Jeffrey subscribed each \$10,000 to the capital stock of said company, and said Budd, Jeffrey, and Scoggin orally agreed each with the other that said corporation should use, own and exercise the franchise granted by said ordinance, and construct and operate the roads provided thereby for its own use and benefit; but said Budd did not then nor has he ever executed any written assignment, transfer, or conveyance of the franchise granted by said ordinance, nor did he make any other written articles of agreement or association with said Scoggin and Jeffrey than the articles of incorporation of the defendant company.

"(4) That by articles of incorporation the defendant corporation, among other things, proposed to build, own, and operate street railways in the city of Portland, Oregon, and to acquire, by purchase or otherwise, any street railway constructed by any other person, and also to acquire, by purchase or otherwise, any franchise granted by the city of Portland for the construction and operating of any street railways in said city.

"(5) That said corporation duly perfected its organization, and E. J. Jeffrey and W. A. Scoggin and D. E. Budd constituted the stockholders, and were the directors of said corporation, and E. J. Jeffrey was elected and acted as president, W. A. Scoggin was elected and acted as secretary, and D. E. Budd was elected and acted as superintendent of said corporation, and under that organization the said corporation proceeded to the execution of the purposes of its incorporation.

"(6) That said E. J. Jeffrey and W. A. Scoggin, relying upon and by reason of the mutual agreement and understanding had and entered into between them and said Budd, mentioned in paragraphs 2 and 3 of these findings, each paid up the subscriptions made by them to the capital stock of said corporation, being the sum of \$10,000 each, and said corporation, by said Jeffrey as president and director, and said Scoggin as director and secretary, and said Budd as director and superintendent, proceeded to construct on said Washington and Eleventh streets an iron railway, and to equip the same at a cost of about twenty thousand dollars, and to operate the same, and to use and exercise the franchise granted by said ordinance No. 3,477, and continued to do so from about January, 1883, until the commencement of this action; and during said period the defendant, under and by virtue of the franchise granted by ordinance No. 3,477, has collected and

received from passengers carried upon its road on Washington and Eleventh streets large sums of money, but the evidence does not show how much, nor does it furnish any basis for an account of the receipts and expenses of operating said railway, or of the profits of said franchise.

"(7) That said D. E. Budd, defendant, was superintendent of the defendant corporation for about nine months, and took charge of the work of constructing the road in Washington and Eleventh streets, and of the operating of said road after it had been built and furnished, and received for his services in that behalf a salary from the defendant corporation of \$100 a month.

"(8) That said D. E. Budd, up to about the time of the commencement of this action, acquiesced in and fully consented to and in the claims of the defendant corporation in respect to the exercise of said franchise by it, and in respect to the ownership of said road and franchise as set forth in these findings, and did not, prior to the commencement of this action, demand from said defendant corporation the possession of said streets, or any portion thereof. Said D. E. Budd did not furnish any money for the construction of said railway, but the said railway was wholly constructed with funds provided by the defendant corporation, and contributed by the said E. J. Jeffrey and W. A. Scoggin as stockholders.

"(9) That said franchise, independent of the railway and equipment, is of the value of ten thousand dollars, (\$10,000.)"

As conclusions of law, the court found that the plaintiff was not entitled to the possession of the franchise, but that the defendant was entitled to such possession. There were no findings as to the amount of damages, and, so far as appears from this record, there was no evidence offered on that subject.

I do not understand that an action at law will lie for the recovery of the possession of a franchise. It is wholly intangible, and not capable of any kind of physical identification or delivery. Therefore a judgment that a party recover such an "airy nothing" would be incapable of enforcement by the ordinary form of process provided for the enforcement of the final judgments of the courts in this state. But, as I understand it, this action is in substance what would be regarded at common law an action on the case to recover damages for the disturbance of the plaintiff in the enjoyment of a franchise, and there can be no doubt that such an action will lie. *Chitty, Pl. 131-142.* But in such case it is damages for the wrong done which the party recovers, and not the possession of the particular franchise. And this, in effect, was what was

Action at law
to recover
possession of
franchise.

held by this court on the former appeal. In this view of the law, no damages having been found for the plaintiff, it is difficult to see on what ground he would be entitled to any relief here, even though we should be of the opinion that the findings show him to be still the exclusive owner of the franchise granted to him by the city of Portland. But, as has been shown, this court held on the former appeal that the plaintiff might have associated with himself such company the defendant, and thereby admit its members to a joint proprietorship in the enjoyment of the franchise in question, and that whether he had done so or not was a question of fact to be determined by proof. The findings of fact, I think, settle this question against the plaintiff.

He did associate with himself Jeffrey and Scoggin, and the three associates built the street railway for the purpose of using and enjoying the identical franchise which had been granted to the plaintiff. To all of these proceedings, the findings show, the plaintiff fully assented, and in fact assisted in carrying them into full effect. Do these acts constitute a wrong to plaintiff? *Thorne v. Mosher*, 20 N. J. Eq. 257. I cannot perceive, under these findings, what wrong the plaintiff has suffered by the acts of the defendant. It was argued here that the defendant was bound to produce some writing by which the plaintiff had conveyed to it the franchise described in the complaint; that, without writing signed by the plaintiff, defendant was a trespasser.

We do not find it necessary to decide at this time whether the right to lay down a railroad track in the streets of the city of Portland, to run cars thereon, and to take fare therefor, is an estate or interest in land, so as to require a writing to convey it or as to whether, lying in a grant, it can only pass by deed. The findings show such consent, acts, and acquiescence, and the expenditure of money, on the faith of the grant, with the plaintiff's consent, as to preclude him from now claiming that the defendant's acts were wrongful. He was the active and efficient cause of the defendant's making large expenditures of money; he was one of its officers at the very time, and superintendent of the work. We could not allow him to now set up his own acts as such superintendent as the identical wrong committed by the defendant of which he now complains.

Laches and
acquiescence
of plaintiff.

In addition to this, the grant was to "D. E. Budd, and such other person or persons as he may associate with himself therein." I am inclined to think this grant carried the thing granted directly to Budd's associates equally with himself, and that the act of association was all that was necessary to point out and identify the grantees, and that, for this purpose,

no writing was necessary ; but, if writing were necessary, the signing of the articles of incorporation of the defendant company would be sufficient.

The principle here stated is somewhat analogous to that involved in *Water-works v. San Francisco*, 22 Cal. 434. It was there held, that when the grant was to George H. Ensign and his associates, and their assigns, who should within 60 days organize themselves in conformity with the laws regulating corporations, that, as soon as the corporation was organized, the franchise granted passed to it by operation of law, without any formal assignment. And the term "associates" received a similar construction in a case involving principles akin to that. *State v. Sibley*, 25 Minn. 387. And I think the reasoning of the court in *Bank v. Boynton*, 11 Cush. (Mass.), 369, tends to support the view suggested.

LORD, C. J.—If the proper construction of the words, "and such other persons as he may associate with himself therein," is that, by the act of associating others with him, the ordinance, *ex proprio vigore*, vests the franchise in them jointly, as intimated in the opinion, that construction is decisive of the case, and upon that ground I can concur in the result. On the other hand, if such words mean that the grant of the franchise is to Budd, and only to such persons as he may associate with himself therein when he so elects, and they agree to become such associates, then, as the subject-matter of the grant is an incorporeal hereditament, and lies in grant, it can only pass from him to them by deed, and the judgment of the court below is error, and ought to be reversed. It was on this last theory that the case was tried, and the argument made here ; the chief controversy being as to the validity of a parol agreement to effect such transfer. The court held it sufficient, which I think was manifest error.

THAYER, J., expressed no opinion, but concurred in the result.

ROME & DECATUR R. CO.

v.

CHASTEEN.

(Alabama Supreme Court, December 19, 1889.)

Negligence of Independent Contractor—Liability of Company.—A railroad company which contracts for the construction of its road, is not liable for injuries caused by the negligence of the contractor when he is exercising an independent employment in contradistinction to an agent or servant.

Same—Operation of Railroad by Contractor—Liability.—An instruction in an action to recover damages for personal injuries, that if the contractor for the construction of a railroad was operating the road and conveying freight and passengers and receiving reward therefor, the railroad company is responsible for his negligence, is erroneous in the absence of any evidence that the company had made an unauthorized surrender of its roadbed and equipment to the contractor, or that the contractor was operating them under a contract which the corporation had no power to make.

Same—Injuries Caused by Construction Train.—Such an instruction is also erroneous when the action is brought by a person who was injured by a construction train, as the contractor may have transported freight and passengers under an arrangement with the company which did not exempt the latter from liability for negligence in that particular service, and at the same time may, under the contract for the construction, have been an independent contractor, occupying a position which did not render the company liable for his negligence.

Same—Instructions.—As a railroad company does not avoid responsibility for an injury caused by the negligence of the agents or servants of another corporation, or of a natural person to whom it may lease or voluntarily surrender its property and franchise without competent authority, an instruction requested by the defendant in an action for personal injuries alleged to have been caused by the negligence of a contractor, must predicate the exemption of the company from liability upon a finding that the person contracted to construct the road was an independent contractor.

APPEAL from Circuit Court, Etowah County.

Action by R. Chasteen against the Rome & Decatur R. Co. to recover damages for personal injuries. The defendant pleaded the general issue and contributory negligence. The following instructions were given to the jury at the request of the plaintiff:

(1) "The court charges the jury that if they believe from

the evidence that the defendant, by the negligence of its agent in operating its train, injured the plaintiff, by mashing two of his fingers, so that it was necessary to have them amputated, and that this was done without any negligence on the part of the plaintiff, then the verdict of the jury must be for the plaintiff." (2) "The court charges the jury that if they believe from the evidence that plaintiff, at time of injury, was in the employ of Daniel Callahan and under the authority of the conductor, and had been used in coupling cars before, and the conductor ordered him to couple the cars, and the coupling of the cars was not manifestly dangerous, then it was not negligence in him in obeying said order and attempting to execute said order." (3) "The court charges the jury that if the jury believe from the evidence that Daniel Callahan was operating the defendant's road from Gadsden to Atalla, and conveying freight and passengers between these points, and receiving reward therefor, then the defendant is responsible for the negligence of the agents and servants of said Callahan, if the jury believe from the evidence there was any negligence on their part." (4) "The court charges the jury that although they may believe that Chasteen went in to couple the cars against the orders of Lunsden, yet if the engineer knew, or ought to have known, the position of peril in which Chasteen placed himself, if he placed himself in such position, and the engineer failed to exercise due care and skill to avoid injuring Chasteen, and Chasteen was injured thereby, the contributory negligence of Chasteen would be no defense, and he would be entitled to recover if he has made out his case otherwise."

The following instructions, asked for by defendant, were refused: (1) "The court charges the jury, at the request of the defendant, that, if they believe all the evidence in this case, they must find their verdict for the defendant." (2) "The court charges the jury for the defendant that if they believe from the evidence that there was no contract between Callahan and defendant to build the road, and Callahan was not building the road, yet if the jury believe from the evidence that the train that injured plaintiff was being operated by Callahan through his agents and servants, and the jury further believe that the plaintiff was a servant of said Callahan, employed on said train to aid in operating it and in loading at the time the injury occurred, then the jury must find for the defendant." (3) "The court charges the jury, at the request of defendant, that, before the plaintiff can recover in this case, the plaintiff must show by the evidence in the case, to the reasonable satisfaction of the jury, that at the time the alleged injury occurred to plaintiff, by his attempting to couple cars, the train was being operated by defendant or under its control,

that the persons operating said train were the servants or agents of defendant in operating said train, and, if the plaintiff has failed to reasonably satisfy the jury of these things by the evidence, then the verdict of the jury must be for the defendant." (4) "The court charges the jury, at the request of the defendant, that building a railroad by a railroad corporation is not a corporate act, and such railroad corporation may employ an individual or company to build such railroad for such corporation; and if the jury believe from the evidence that the defendant employed one Callahan to build its railroad, and the jury further believe from the evidence that the alleged injury occurred to plaintiff while he was attempting to couple cars, and that the train of said cars was being operated by said Callahan through his agents to aid him in building said railroad, that the plaintiff was employed by said Callahan to work on or about said train at the time of the alleged injury, and at such time the engineer and conductor were the agents and servants of said Callahan to operate said train, then, in such case, the defendant is not liable for such injury, and the verdict of the jury must be for the defendant." (5) "The court charges the jury, at the request of the defendant, that if they believe from the evidence that, at the time of the alleged injury, Callahan was engaged in building the defendant's railroad, whether under contract with defendant or not to build said road, and the jury further believe from the evidence that the alleged injury occurred to plaintiff by his attempting to couple cars, and that the train of said cars was being operated by said Callahan, through his agents, to aid him in building said railroad, that Lunsden and the engineer were the agents of Callahan to operate said train at the time of the injury, and at the time of said injury the plaintiff was the servant of Callahan, employed to work on or about said train, then, and in such case, the defendant is not liable, and the verdict of the jury must be for the defendant." (6) "The court charges the jury, at the request of the defendant, that if they believe from the evidence that, at the time of the alleged injury, Callahan was not employed by the defendant to build its railroad, and was not engaged in building any railroad, yet if the jury believe from the evidence that, at the time of the alleged injury, Callahan, through his servants and agents, was operating said train of cars for his own benefit or use, and that the alleged injury occurred to plaintiff while he was attempting to couple cars composing a part of said train, and at such time the plaintiff was a servant or agent of the said Callahan, employed to work on or about said train, then, in such case the defendant is not liable, and the verdict of the jury must be for the defendant." (7) "The court charges the

jury, at the request of the defendant, that in ascertaining whether the plaintiff, conductor, or other persons were the servants or agents of Callahan in operating said train, and whether the train was being operated by Callahan to aid him in constructing the railroad, or for any other purpose, for his own use or benefit, at the time the alleged injury occurred, the jury may look to the evidence to ascertain whether Callahan employed and paid the plaintiff and other persons engaged in operating said train, and if, at the time of injury, the train was loaded and carrying its load for Callahan's use or benefit, and to aid him, and what kind of property or things the load consisted of; and if the jury, after considering these things, if they appear in the evidence, in connection with all the other testimony in the case, are reasonably satisfied that the plaintiff was a servant employed by Callahan to aid in operating or working about said train, and said train was being operated by said Callahan through his servants or agents, for his own use or benefit, and that the alleged injury occurred to plaintiff by his attempting to couple cars of said train while it was being so operated or worked on by plaintiff and others as the servants of said Callahan, then, in such case, the defendant is not liable, and the verdict of the jury must be for the defendant." (8) "If the jury believe from the evidence that the plaintiff was in a place of danger, yet if the jury believe from the evidence that the plaintiff took such place of danger at such a time, and under such circumstances, that the engineer, although he saw plaintiff, could not have prevented the injury by the exercise of due skill and care, then the plaintiff cannot recover; and in determining this question the jury will look to the evidence to determine how close the cars were to each other, whether they were moved down by engineer, and whether the engineer could have given such force to cars as stated by plaintiff, the distance they were apart, or the distance the evidence of defendant's witnesses show the cars were from each other, and the speed they were moved down, and where the plaintiff was before he went between the cars, and taking these matters in consideration, with all the other evidence in the case, the jury are reasonably satisfied from the evidence that the plaintiff took the place of danger on such a sudden and short time as not to give the engineer the power to prevent the injury by exercise of due care, then the defendant is not liable, and the jury must find verdict for defendant."

Defendant appeals from a judgment for the plaintiff.

Denson & Tanner for appellant.

Dortch & Martin for appellee.

CLOPTON, J.—Plaintiff's right to recover for the personal

injuries complained of is based on the alleged negligence of the engineer, while he was attempting to couple cars in obedience to the order of the conductor of the train. At the time of the injury the train was engaged in transporting iron and cross-ties to be used in the construction of the road of the defendant, the Rome & Decatur Railroad Company. The main defense is that the conductor, engineer, and plaintiff were not the employees and servants of the company, but were employed and paid by one Callahan, who was engaged in constructing the road, and that the defendant is not responsible for his or his servant's wrongful acts or omissions. The decisions of this court are in line with those authorities which hold that a person who contracts for the erection of a structure, though for his own use, is not liable for injuries caused by the negligence of the contractor or of his servants, when he is exercising an independent employment—when he is an independent contractor, in contradistinction to an agent or servant. *Mayor, etc., of Birmingham v. McCary*, 84 Ala. 469; *Myer v. Hobbs*, 57 Ala. 175. A railroad corporation, being clothed with full authority to construct its road in a manner suitable to its purposes and uses, may have the work performed by the employment of its own agencies and instrumentalities, or by independent contract. In respect to liability for the negligence of the contractors and their servants, the law makes no distinction between natural persons and corporations. A railroad company, which contracts with a third person for the construction of its road in such a manner that the contractor has the right to direct the details of construction, and to control the mode in which the work shall be done, and the agencies employed, the company only reserving the right to insist that the result shall be in compliance with the terms of the contract, is not liable for injury caused by the negligence of the contractor or of his employees. Liability for injuries suffered during the process of construction depends, as in the case of natural persons, on the existing relation—whether of master and servant, or contractor and contractee. *Cunningham v. International R. Co.*, 51 Tex. 503; *Kansas Cent. R. Co. v. Fitzsimmons*, 18 Kan. 34; *Hughes v. Cincinnati & S. R. Co.*, 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100. The test most comprehensive and generally applicable, which includes the several special tests suggested, is stated in 1 *Shear. & R. Neg.* § 164, as follows: "The true test, as it seems to us, by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the

Liability for
negligence of
independent
contractor.

result of his work, and not as to the means by, which it is accomplished."

The evidence establishes without dispute that Callahan was engaged in building the road, and was in possession of and using the engine and cars for the transportation of iron and cross ties, and of freight and passengers, to and from Gadsden and Atalla, receiving the toll therefor, and employed and paid the workmen. Whether or not these facts are *prima facie* sufficient

Sufficiency of evidence to establish independent contract.

to show that Callahan was an independent contractor or the members of the court are divided in opinion. Some of them deem them sufficient, and hold that the affirmative charge requested by defendant should have been given. Speaking for myself, as no contract was produced or proved, which was in the power of the defendant, evidence that the engine and cars belonged to the company, and that the road was being constructed for its benefit, if believed, *prima facie* shows that those employed in the work of construction were the agents and servants of the company, and devolves the burden to prove that the road, engine, and cars were in the possession and under the control of Callahan as a contractor, and that those employed were exclusively his agents and servants. As an inference may be reasonably drawn that the company retained the right to direct what should be done and how—the general mode of performance—though Callahan may have employed and paid the workmen, the sufficiency of the undisputed facts mentioned to overcome the presumption arising from ownership was a question for the jury, on consideration of all the circumstances proved. All of us concur, if they should find that the persons employed by Callahan were his agents and servants, whom defendant had no right to dismiss or otherwise control, the company would not be responsible for an injury caused by the negligence of the engineer. 1 Shear. & R. Neg. § 158; New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. (U. S.), 649; Speed v. Atlantic & Pac. R. Co., 71 Mo. 303, 2 Am. & Eng. R. Cas. 277. But as the case must be reversed on other points, and as additional proof may be adduced on another trial, we shall leave this question undecided.

As a material issue was whether the persons employed were the servants and agents of Callahan or of the company, the first charge requested by the plaintiff is obnoxious to the criticism that it is calculated to draw the minds of the jury from such issue, and to create the impression that negligence *vel non* was the pivotal issue in the case.

The third charge given at the instance of plaintiff bases the responsibility of defendant upon the isolated fact that Calla-

han was transporting freight and passengers to and from Gadsden and Attalla for reward. The charge is defective in two respects: (1) It does not claim that the company had made any unauthorized surrender of the road, engine, and cars, or that Callahan was operating them under any contract which the corporation had no authority to make. Under the charge, the jury were authorized to hold the company liable, though Callahan may have been operating the road without defendant's permission and against its objection; or though he may have been an independent contractor, having possession and control, and operating the finished portion in aid of the further construction of the road under a contract with the company. *Kansas Cent. R. Co. v. Fitzsimmons, supra.* (2) Plaintiff was injured while the engine and cars were employed in transporting iron and crossties for the purpose of construction. Callahan may have transported freight and passengers under an arrangement with defendant which did not avail to exempt from liability for his or his servants' negligence while rendering that particular service, and at the same time, in respect to the work of construction, have exercised an independent occupation, which avoided responsibility on the part of the company while rendering that particular service. As plaintiff was not injured while freight or passengers were being transported, such use of the road, engine and cars does not constitute a sufficient ground on which to make defendant liable for his injury, if Callahan was an independent contractor for the construction of the road.

Transportation of passengers for reward.

The second, fifth and sixth charges requested by the defendant assert the proposition that the company is not liable if Callahan was operating the engine and cars by his agents and servants; though he was not employed to construct the road, or engaged in its construction. The proposition of the charge is that a railroad corporation is not responsible for the torts of any person actually operating its line, whatever may be the circumstances under which he is so operating it. Actual operation by the corporation at the time of an injury is not essential to liability. A railroad corporation does not avoid responsibility for an injury caused by the negligence of the agents or servants of another corporation, or of a natural person, to whom it may lease or voluntarily surrender its property and franchises without competent authority. *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 601, 37 Am. & Eng. R. Cas. 12. The charges should have predicated exemption from liability as part of the hypothesis, on the jury finding that Callahan was an independent contractor.

As to contributory negligence, we may remark that if

plaintiff was an employe of defendant, subject to the control of the conductor, an attempt to couple the cars in obedience to his order would not constitute negligence on his part; but if he attempted to do so in violation of the order of the conductor, and without occasion or necessity placed himself in a condition of peril, from which he could not escape by the exercise of ordinary care, this would be contributory negligence. The second charge given at the instance of the plaintiff in relation to this question is abstract, being based on the hypothesis that plaintiff was in the employ of Callahan, and not of defendant. The eighth charge requested by defendant is argumentative, and for this reason, if no other, was properly refused.

Reversed and remanded.

Who are Independent Contractors.—See *Rogers v. Florence R. Co.* (S. Car.), 39 Am. & Eng. R. Cas, 384, note 354.

EASTERN TOWNSHIPS BANK.

v.

ST. JOHNSBURY & LAKE CHAMPLAIN R. CO.

(*U. S. Circuit Court, D. Vermont, November 7, 1889.*)

Lease—Power to Guarantee Interest on Bonds of Lessor.—Section 3303, Rev. Laws Vt., which provides that railroad companies may make contracts for leasing and running the roads of other companies, confers upon a railroad company power to enter into a lease by which it agrees to guarantee payment of the interest coupons on the mortgage bonds of the lessor company.

Same—Guarantee of Interest Coupons—Validity.—A statute which prohibits a railroad company to issue its notes or bonds in sums less than \$100 does not preclude a company from executing a guarantee to "pay the interest upon the within bond as specified in the interest coupons thereto attached," although the interest in each coupon be less than \$100, such guarantee not being a separate promise to pay each coupon, but a guarantee to pay the whole interest to become due on the bond.

Same—Action upon Guarantee by Bona Fide Purchaser—Defenses.—By the Vermont Statute, only bills and notes are negotiable and not a guarantee of a bond or coupon, although such bond or coupon should be negotiable, and in an action by a *bona fide* transferee of the bonds or coupons upon the guarantee, the guarantor may make any defense to the action that he could have made if the suit had been brought by the original payee.

AT LAW.

Dickerman & Young and Albert P. Cross for plaintiff.
Stephen C. Shurtley and Richard Olney for defendant.

WHEELER, J.—The defendant joined with other railroad companies in taking a lease of the railroad of the Canada Junction Railroad Company, not built, but agreed to be built by Bradley Barlow, and in the execution of this guaranty upon 150 \$1,000 negotiable bonds of that company, which Barlow was to have in payment for building the road. "For value received in the use and operating of the Canada Junction Railroad under a lease thereof and assignments of said lease, the Montreal, Portland & Boston Railway Company, the Southeastern Railway Company of Canada, and the St. Johnsbury & Lake Champlain Railroad Company of Vermont, do hereby jointly and severally guaranty the payment of the interest upon the within bond, as specified in the interest coupons thereto attached at the place and at the several dates therein specified." The rent was equal to the coupons, which were themselves negotiable, in amount and times of payment. The bonds, with the guaranty upon them, and coupons attached, were delivered to Barlow, and by him pledged to the Vermont National Bank of St. Albans, and by that bank to the plaintiff, to secure advances of money. Barlow failed without accomplishing but a small part of the building of the road, and his failure caused the enterprise of building the road, and the Vermont National bank, to fail. The road has never been built, and through the failure and default of Barlow, the defendant, with the other railroad companies, has been deprived of the use and operating of it for which the guaranty was made.

Facts.

This suit is brought by the plaintiff, as holder of the bonds and coupons for value, upon the guaranty, to recover the amount of the coupons due, and has been heard by the court upon written waiver by the parties of a trial by jury. The defendant contends that the guaranty was without the scope of its corporate powers, and therefore void; and relies upon *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 24 Am. & Eng. R. Cas. 58; *Pennsylvania R. Co. v. St. Louis, A. & T. R. Co.*, 118 U. S. 290, 630, and *Oregon R. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 39 Am. & Eng. R. Cas. 176, in support of this position; and that if not, the consideration has so far failed, through the default of Barlow, to whom the bonds were first delivered, that it has ceased to be binding. In those cases no power had been conferred upon the corporations in question, by their charters or the laws under which they existed, to enter into the contracts held to be *ultra vires* and void. The laws of Vermont, under which the defendant has and exercises its corporate powers, provide that "railroad companies in this state may make contracts and arrangements with each other, and with

Power to
guarantee in-
terest.

railroad corporations incorporated under the laws of other of the United States, or under the authority of the government of Canada, for leasing and running the roads of the respective corporations, or a part thereof, by either of their respective companies." R. L. Vt. § 3303. This statute conferred ample power upon the defendant corporation to take the lease, and to agree to pay the rent as it should fall due, and doubtless to arrange for paying the rent, by paying coupons of the same amount or guarantying their payment. *Railroad Co. v. Railroad Co.*, 34 Vt. 1, 50 Vt. 500; *Langdon v. Vermont & C. R. Co.*, 54 Vt. 593, 11 Am. & Eng. R. Cas. 688; *Hazard v. Vermont & C. R. Co.*, 17 Fed. Rep. 753, 12 Am. & Eng. R. Cas. 388. To hold these arrangements to be within the corporate powers of the defendant appears to be in accordance with the principles of, and not contrary to, the decisions of the supreme court of the United States referred to.

The laws of the state also provide that "a railroad corporation, if it so votes at a meeting of its stockholders called for that purpose, may issue its notes or bonds in sums not less than one hundred dollars to raise money or to extinguish any debt or liability of the company, on time not to exceed thirty years, and at a rate of interest not to exceed seven per cent." R. L. Vt. § 3350. In a class of cases absolute guarantors of payment of promissory notes by indorsement upon the notes themselves have been holden as makers. *Hough v. Gray*, 19 Wend. (N. Y.), 202; *Miller v. Gaston*, 2 Hill (N. Y.), 188; *Edw. Bills*, 220. These guaranties are not upon the coupons, strictly, but upon the bonds separate from the coupons. If, however, they should be considered as being upon the coupons, so that each coupon would be a note of which the defendant was maker, the statute would not cover them, but might impliedly exclude them as notes of the defendant, because each one is less in amount than the statute allows. To hold the defendant to be a guarantor of the interest on the bonds, instead of a maker of the coupon, seems to be most consistent; for the parties are to be presumed to have intended that this contract should be good rather than void.

The undertaking of the defendant as it stands on each bond is to be construed in view of the circumstances apparent to all under which it was entered into. The road was to be built before the use and operating could be had. The value received in the use and operating acknowledged was to be received afterwards, before the respective installments would fall due. The meaning of the contract seems to have been that for the use and operating of the road the defendant and the other companies would see the interest paid. They as-

sumed that the road should earn enough to pay the interest as it should fall due, and that the earnings should be applied to the payment of it, if not paid otherwise. The consideration was future, and if it failed the agreement would fail for want of any.

The guaranty named no particular person as guarantee, but was open to whoever should acquire the bonds first. *Watson v. McLaren*, 19 Wend. (N. Y.), 557. Barlow was the first to acquire these bonds as holder. Had he kept them he could not have enforced them, as to either principal or interest, against the maker; for they were made and delivered to him for building the road, and when he failed to do that the consideration failed. Relief of the maker would relieve the guarantor. This consideration as to the maker rests upon the supposition that the instruments, although under seal of the corporation, and in form and named bonds, are simple contracts, whose consideration may be inquired into. If, however, the seals conclusively import consideration for the bonds, as such, in respect to the maker, the guaranty is not under seal, and is unquestionably a mere simple contract. The consideration of that which was expressed to be the use and operating the road, and different from that of the bonds, has failed also through the default of Barlow. He could not deprive the defendant of the consideration of this contract and at the same time enforce it. The plaintiff is not entitled to recover upon this guaranty unless it has some right superior to Barlow's. The only source for such right is the supposition that the guaranty had the qualities of negotiable paper, and was current for what it appeared to be to those taking it, without notice of infirmity, for value. The bonds and coupons are expressly negotiable. The guaranty is not by its own terms made to be so. The negotiability of the instruments with which it is connected does not appear to be sufficient to make it so. The statute declaring negotiability of bills and notes, taken from that of 3 & 4 Anne, chap. 9, does not extend to any other instrument. *R. L. Vt.* §§ 2002, 2003; *Edw. Bills*, 219. These collateral contracts, made by those not parties to the notes, are not generally understood to partake of the negotiability of the instruments on which they may be placed. *Taylor v. Binney*, 7 Mass. 479; *True v. Fuller*, 21 Pick. (Mass.), 140; *Watson v. McLaren*, 19 Wend. (N. Y.), 557; *Miller v. Gaston*, 2 Hill. (N. Y.), 188; *Story, Prom. Notes*, § 484; *Sandford v. Norton*, 14 Vt. 228; *Sylvester v. Downer*, 20 Vt. 355. Especially must this be true where, as here, the principal of the instrument upon which the guaranty is placed is not included in the guaranty, and the guaranty

Bona fide purchasers—Defenses to action by.

expressly rests upon a separate consideration, This guaranty appears from all these considerations to have been a mere simple contract with Barlow collateral to the bonds, whose character was apparent upon its face, and which could not be enlarged or made more indefensible in the hands of subsequent holders, with or without further notice, and whether for value or otherwise. *Central Trust Co. v. First Nat. Bank of Wyandotte*, 101 U. S. 68. The Vermont National Bank acquired all the rights that Barlow had to the bonds and coupons, with the guaranty on the bonds, including the right to enforce the guaranty in his name so far, and so far only, as he could enforce it for any purpose. The plaintiff took the same rights, and does not now appear to have in any manner acquired any greater. No view of these instruments is presented, or presents itself, upon which the plaintiff appears to be entitled to recover in this case. The judgment here must therefore be for the defendant.

Power to Guarantee Bonds of Another Company.—See note, 33 Am. & Eng. R. Cas. 33; *Camden & A. R. Co. v. Coxe* (Pa.), 26 *Id.* 102, note, 105; *Atchison T. & S. F. R. Co. v. Fletcher* (Kan.), 24 *Id.* 34; *Macon & A. R. Co. v. Georgia R. Co.* (Ga.), 1 *Id.* 378.

Guarantee of Lease to Another Company.—See *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (U. S.), 24 Am. & Eng. R. Cas. 58.

DARDANELLE & RUSSELLVILLE R. CO.

v.

SHINN.

(*Arkansas Supreme Court, October 12, 1889.*)

Contract for Ferriage—Construction—Actual Gross Earnings.—A railroad company whose line terminated on the bank of a river entered into an agreement with the owner of a ferry, by which the latter agreed to transport all passengers, freight, baggage, etc., presented for ferriage by the railroad company. The railroad company agreed to pay the ferryman "one-fifth of the actual gross earnings" of the railway on all passengers, freight, etc., carried across the river. The company let the contract to haul its passengers to a transfer company, which ostensibly charged 25 cents for transporting each passenger to or from the terminus of the track and points in the town across the river. The fare from one terminus of the railroad to the other was 50 cents, which sum added to the hack fare made 75 cents for the complete trip. Passengers were not required to

purchase hack tickets, and the railway fare entitled them to free ferriage. *Held*, that under the agreement the ferryman was entitled to one-fifth of the gross receipts for the carriage of the passengers in the hack, and not merely to one-fifth of the sum retained by the railroad company after deducting the compensation of the transfer company.

APPEAL from Circuit Court, Johnson County.

U. M. & G. B. Rose for appellant.

G. W. Shinn for appellee.

COCKRILL, C. J.—The only question involved in this case is the true construction of the terms of a written contract. The record shows substantially the following state of facts: The appellant owns a short line of rail- Facts. way running between Russellville and a point on the Arkansas river opposite the town of Dardanelle. Shinn, the appellee, is proprietor of a steam-ferry between Dardanelle and a point near the terminus of the railroad track. The company is known as the Dardanelle & Russellville Railway Company, and sells tickets to passengers and issues bills of lading for freight, from the town of Dardanelle to Russellville, and from Russellville to Dardanelle. It maintains a passenger ticket office, and a warehouse for the receipts of freights, in the latter town. To facilitate the transaction of its freight and passenger business it entered into a written agreement with Shinn, by the terms of which the latter agreed (to quote from the contract) "to ferry all passengers, freight, baggage, mail, express matter, live-stock and other kinds of freight presented for ferriage by the party of the second part (the company) in the course of transportation by it, together with such conveyances as may be necessary to convey and transfer the same with dispatch and safety across the Arkansas river, for and in consideration of which ferriage, and the services in regard thereto, the party of the second part hereby agrees to pay the party of the first part (Shinn) one-fifth of the actual gross earnings of the railway, the party of the second part, on all passengers, freight, mail, express, or other matter, of every kind and nature whatsoever, carried across the said river either way." Under the agreement the company transported its freights from the terminus of its track across the ferry to its destination in Dardanelle, and from Dardanelle to the railway, at its own cost, and accounted to Shinn for one-fifth of the gross amounts earned thereby, and for the same proportion of the gross receipts for mail and express matter. It let the contract to haul its passengers to a transfer company, which ostensibly charged 25 cents for transporting each passenger to or from the terminus of the track and points in the town

of Dardanelle. The passenger vehicles were carried over the ferry without charge by Shinn, under the impression that they were acting for the railway company, as a continuation of its line. The railway company sold the hack tickets, and out of the proceeds paid the transfer company 20 cents for their services, and retained 5 cents as a commission for selling such tickets, and as pay from the transfer company for ferriage for their hacks. The fare on the railway proper between Dardanelle and Russellville was 50 cents, which sum, added to the hack fare, made 75 cents, for a complete ride between the two towns. Passengers were not required to purchase the hack tickets, and the railway fare entitled them to free ferriage without transportation from the terminus of the track to the ferry. The railway company accounted to Shinn for one-fifth of the amount collected by them as railway fare,—that is, 10 cents on each passenger and one-fifth of the 5 cents retained by them on the sale of each hack ticket. Shinn contended that he was entitled to 5 cents for each hack ticket sold, as being a part of the gross earnings contemplated by the contract. The railway company insisted that the transfer company was not part of its system, and what it earned was a matter of no concern to Shinn. The latter instituted this suit to recover the difference between the amount he received and what he claimed. The cause was tried without a jury before the circuit judge, who heard testimony establishing the facts above detailed, and found therefrom that Shinn was entitled to recover. The only ground assigned for a new trial is that the finding is not sustained by the facts.

The duty of the judge was to ascertain what was meant by the parties by the use of the term "gross earnings of the railway." To do that it was necessary that he should put himself, as nearly as possible, in the position of the parties at the time of making the contract, and to inform himself of everything which could legally eliminate the question of their intention; for the foremost rule of interpretation is to give to language employed by the parties to a contract the meaning they intended, if it is capable of more than one interpretation. Could the circuit judge legally reach the conclusion that the term "gross earnings of the railway" included the earnings of the transfer company? The railway company was actually engaged in a transportation business other than that carried on by the railway proper; that is to say, it ran a line of wagons from the termination of its tracks to the town of Dardanelle, in connection with, and as an appendage to, its railway business, in order to reach the destination its name indicated, and to fulfill the contracts

Meaning of
"gross earnings of railway."

for transportation it was in the habit of entering into after as well as before its stipulation with Shinn. It may not be strictly within the corporate powers of the railway to carry on a transportation business between its terminus and Dardanelle, but if such a business is operated by it, and a charge is made over the line as for one indivisible trip, what is received by the company as compensation therefor would be earnings of the railway company, for that is the style under which the concern is operated. An individual who contracted with the company about its earnings would be justified in that construction.

The earnings of a railway, say the supreme court of the United States in the case of *Union Pac. R. Co. v. United States*, 99 U. S. 419, "must be regarded as embracing all the earnings and income derived by the company from the railway proper, and all the appendages and appurtenances thereof, including its ferry and bridge, * * * its cars, and all its property and apparatus legitimately connected with its railroad." That was the view entertained by the parties to the contract in dispute, as is shown by their division of the gross earnings for freight, etc., carried by the company. But by the terms of the contract freight and passengers are put upon exactly the same footing. It will not do, therefore, for the company to say that Shinn is entitled to one-fifth of the gross earnings received for freight, but shall not participate in like manner in the gross earnings from passengers, unless they can show some reason other than the terms of the contract for the distinction. We do not understand that that is the position of the officers of the company who negotiated the contract with Shinn. They seem to assume because they have farmed out the privilege of running vehicles to transport passengers from the terminus of the road to the river and thence into Dardanelle, and thus shifted the burden of that part of the trip to other shoulders, they may share with Shinn the net profit that is received by them on such transportation, and, instead of paying him one-fifth of the gross sum received for such transportation, pay him one-fifth of the net earnings. But the non-ownership of the transportation company does not tend to alter the case so long as the transportation privilege is practically controlled or managed by the railway as part of the system. What is received from the passengers, under the circumstances, is as much a part of the gross earnings of the company as what is received for freight transported over its railway and wagon line. The latter the company concedes, as we have seen, is covered by the contract. There is no proof in the record to indicate that the state of

*Union Pac. R.
Co. v. United
States.*

facts existing at the time the contract was made would justify any distinction between the gross earnings from the freight and passengers. Shinn's testimony is to the effect that, in carrying the passenger vehicles over his ferry without charge, he supposed they were a continuation of the railway line of business. The contract contemplates that such vehicles may be used by the company for that purpose; and there is nothing, except the company's subsequent refusal to pay, that tends to show that either party contemplated that such a distinction should exist. We think the circuit judge was warranted in concluding that the gross amount earned in the carriage of passengers between Russellville and Dardanelle was contemplated by the parties in the use of the terms adopted by them. We do not hold that the railway company is under obligation to Shinn to run a transfer business in connection with its railway, or that it may not run such a business south of the ferry into the town of Dardanelle without allowing him to participate in the receipts. Those questions are not before us. Affirmed.

Contracts of Ferry Company with Railroad Company.—See *Niggins Ferry Co. v. Chicago, etc., R. Co.*, 5 Am. & Eng. R. Cas. 1.

EAST LINE & RED RIVER R. CO.

v.

STATE, *ex rel.* HOGG.

(*Texas Supreme Court, December 17, 1889.*)

Sale of Railroad—Construction of Statute Conferring Power.—A railroad company which has authority by its charter "to join stock or consolidate with any other railroad company running in the same general direction" is not empowered to sell its road and franchises to another company, whose road is not a competing line and does not run in the same general direction, although its charter contains a clause forbidding it to "rent, sell, lease or consolidate with any parallel or competing railroad."

Same—Connecting Railroad Company.—Power conferred upon a railroad company "to purchase, sell, lease, join stocks, unite or consolidate with any connecting railroad company," does not authorize the company to purchase a railroad which connects, not with the line it was authorized to construct, but with a line which it has built or purchased.

Same—Competing Railroads.—When a statute prohibits a railroad company from selling its road or franchises to, or consolidating with a competing company, railways, by reason of their relations, or the control or management of other lines than their own, may become competing lines within the meaning of the law.

Same—Acceptance of Benefit of Legislation.—If a railroad company admits, in an action against it, that "it is subject to the constitution and

general laws of the state now in force," it thereby admits having accepted the benefits of legislation subsequent to the adoption of a constitutional provision, which provides that no railroad company in existence at its adoption "shall have the benefit of any future legislation except on condition of complete acceptance with the provisions of this constitution," and it is subject to a provision in such constitution forbidding it to sell its road and franchises to a railroad company organized under the laws of another state.

Forfeiture of Franchise—Waiver of Right to Demand.—A statute which provides that proceedings in *quo warranto* may be instituted against a corporation carrying on business in violation of a constitutional provision, forbidding sale to, or consolidation with, competing or foreign companies, and for an injunction against future violations of such constitutional provisions, and the appointment of a receiver, does not waive the right of the state to demand the forfeiture of the franchises of a railroad company for a violation of the constitution, when by statute the duty is imposed upon the attorney-general to enforce the forfeiture of the charters of corporations for misuser or non-user.

Same—Appointment of Receiver.—A statute which provides for the appointment of receivers upon judgment dissolving corporations, is valid although it contains no provision for bringing the stockholders and creditors of the company into court.

APPEAL from District Court, Travis County.

Baker, Botts & Baker and *Fisher & Townes* for appellant.
J. S. Hogg, Atty-Gen., for appellee.

STAYTON, C. J.—This is a *quo warranto* proceeding by the state, upon the relation of the attorney general, seeking a forfeiture of the charter rights and franchises of the respondent, upon the following alleged grounds:

Grounds of
forfeiture.

(1) Permitting its roadbed, rolling stock, and general equipments to so get out of repair as to retard travel and commerce, and to render the transportation of passengers over its road hazardous, dangerous, and extremely uncomfortable; thereby rendering itself unable to perform its duties to the public, or to carry out its objects and purposes of its creation. (2) Failure to keep a public office in the state, and on the line of its road, and the removal of the same beyond the limits of the state. (3) Failure of its stockholders and directors to hold annual meetings on the line of its road for more than five years. (4) The sale of all its franchises, rights, and privileges, together with all its stock, roadbed, buildings, depots, tools, bonds, grants, and other property, to the Missouri, Kansas & Texas Railway Company, a railroad corporation chartered under the laws of Kansas, and controlling and operating a competing and parallel line of railway. (5) That the president, managers, superintendent, and other officers and employes of said parallel and competing line of railway are in control of, manage, and operate respondent's railway and corporate affairs exclusively at and from the state of Missouri, in violation of the laws and constitution of this

state; and that under said foreign and unlawful management its franchises have been so abused as to bankrupt and render insolvent respondent's railway. (6) That its bonds and stocks have been increased far beyond the value of its entire corporate property and franchises, and not for money paid, but to increase the burdens of said railway, and to form an excuse for heavier and more unreasonable charges on freight and passenger traffic. (7) That it has entered into a contract and conspiracy with other railway companies for the purpose of stifling and preventing competition in passenger and freight rates; that instead of exercising its own franchises, and regulating and fixing its own tolls of passenger and freight traffic, and time-tables and regulations of its trains, over its own line, it has by the contract, sale and combination left all such matters to the control of the other railways, and to an organization known as the "International Traffic Association." (8) That, by said sale of all its property and franchises, respondent has committed self-destruction, violated its public duty to maintain and operate its road, suspended the exercise of its franchises as a railroad company, and wholly rendered itself unable to resume its obligations or to perform its duties to the public.

The respondent filed a general demurrer to the state's bill, and especially excepted to each of the averments therein,

Demurrer to bill. which, on preliminary hearing, was overruled, upon the ground that while some of these allegations, considered separately, might not justify a forfeiture, yet there were good grounds for a forfeiture stated, especially those concerning the run-down and bad condition of the road, and the sale of franchises, and, in determining whether or not the judgment sought should be rendered, all the charges in the bill should, upon the question of intent, be inquired into. The respondent also filed a general denial, but admitted the sale of its properties and franchises to the Missouri, Kansas & Texas Railway Company, reserving its right to remain a corporation; and claims that said sale was not unlawful. It also admits that it is subject to the constitution and general laws of the state, and that the Missouri, Kansas & Texas Railway Company is chartered and organized under the laws of the states of Kansas and Missouri. The cause was tried without a jury.

Respondent is a railway corporation chartered, organized, and acting under and by virtue of the special laws passed by the legislature of the state, on the 22d day of March, A. D. 1871, and amendments thereof passed, respectively, May 17, A. D. 1873, and March 6, A. D. 1875, authorizing it to construct, own, and maintain a line of rail-

Facts.

way, with either a single or double track, from the city of Jefferson, in Marion county, to the town of Greenville, in Hunt county, via Mt. Pleasant, in Titus county, and Sulphur Springs, in Hopkins county; thence, in a westwardly or north-westwardly direction, to the western limits of the state. The duration of the charter is fixed at 60 years from the date of the completion of the railroad; and it further provides that the company shall be entitled to 16 sections, of 640 acres each, of land for each mile of road completed. The act of March 22, 1871, contained the following provision: "Said company is authorized, and the right is hereby granted them, to cross or connect with any other railway, to join stocks or consolidate with any other railway company, running in the same general direction." And the act of May 17, 1873, the following: "That the state reserves the right to regulate, by general law, the rates, * * * as well as the management and control, of said railroad, its officers and employes," etc. "That said company shall not have the right to rent, sell, lease, or consolidate with any parallel or competing railroad in this state." Appellant specially pleaded the acts from which the foregoing quotations are made, and no other. The right to grants of land was given by the act last named, which authorized the construction of a single or double track, of the gauge of four feet eight and one-half inches; but by act of March 6, 1875, the company was authorized to adopt any gauge, not less than three feet. The only law of this state having special relation to the Missouri, Kansas & Texas Railway Company, brought to the attention of the court below or this court, is the act of August 2, 1870, which contains the following provisions: "The Missouri, Kansas & Texas Railway Company, a corporation authorized by congress, * * * shall have the right to extend its railroad, with its present gauge, together with its telegraph lines, from some convenient point on Red river, between Preston and Doaksville, where its road shall cross from the Indian Territory, into and through the state of Texas, in the general direction of Waco and Austin, to the Rio Grande, with a view of extending the same to Camargo and the city of Mexico; and also the right to construct a branch road from a point at or near its crossing of Red river, westwardly," etc. "That the said company, in constructing, extending, and operating its railroad and branches, shall have and exercise, and are hereby vested with, all the rights, powers, privileges, and immunities granted by its acts of incorporation and amendments thereto, so far as the same may be applicable to this state, and not inconsistent with the constitution thereof," etc. "That the said company shall have the right to purchase, sell, lease,

join stocks, unite, or consolidate with any connecting railroad company," etc.

The court below made findings of fact, which are sustained by the evidence, and we do not understand appellant seriously to controvert their general correctness. These, so far as necessary to a correct understanding of the case, will be here given :

Findings. "(2) That, as such railway company, respondent, constructed and built a narrow-gauge railroad from said city of Jefferson, via Greenville, in Hunt county, to McKinney, in Collin county, Tex., a distance of one hundred and fifty-five miles, and received from the state for so doing land certificates at the rate of sixteen sections (640 acres each) per mile.

"(3) That on the 28th day of November, 1881, respondent sold and delivered all its corporate franchises, rights, and privileges, together with all its stock, roadbed, buildings, depots, rolling stock, engines, tools, etc., to the Missouri, Kansas & Texas Railway Company, a corporation chartered under the laws of Kansas and Missouri. That by said sale and deed of conveyance respondent reserved the right to remain a corporation until such time as might be agreed upon for its dissolution, and provided that its power to carry out its contracts should remain unimpaired; and it obligated the said Missouri, Kansas & Texas Railway Company to fulfill all of respondent's charter obligations to the state and to the public; and the conveyance contains this recital: 'The object and intent of this contract, conveyance, and agreement being to so merge the rights, powers, and privileges of the party of the first part into the party of the second part, under its own charter, corporate name, and organization, that it shall, without impairing any existing right, exercise, in addition thereto, all powers, rights, privileges, and franchises, and own and control all properties, that the party of the first part now exercises, owns, or by its charter or the laws it has the right to exercise, own, or control.'" The last quotation is from the contract between the two corporations.

"(5) It is shown that a majority in interest of the stockholders of both respondent and the Missouri, Kansas & Texas Railway Company, in proper form, consented to, authorized, and approved the aforesaid sale.

"(6) In accordance with said act of the legislature of August 22, 1870, the Missouri, Kansas & Texas Railway Company constructed its road across Red river into Texas, in a southward direction, and in the general direction of Waco and Austin, via Denison, Whitesboro, Fort Worth, and to the city of Waco; thence, in the general direction of the city of Austin, southward to Taylor, in Williamson county, and a

branch road from Whitesboro west to Henrietta, Tex. At the time of the aforesaid sale from respondent to it, said Missouri, Kansas & Texas Railway Company was operating a railroad from Denison to Greenville, and extending thence, in a southeasterly direction, to Mineola, where it connects with the International & Great Northern Railroad and the Texas & Pacific Railroad. With the former it makes a continuous line to Galveston. From Denison, the Missouri, Kansas & Texas runs north to Sedalia, Mo., where it forms connection with other lines leading to St. Louis. The East Line & Red River Railroad, at time of said sale, connected with water transportation to New Orleans, and with the Texas & Pacific Railroad, running, with its connecting lines, to St. Louis, at Jefferson. The Houston & Texas Central Railroad runs from Dallas north to Dennison, via McKinney, and was so running at the time of said sale and consolidation, and it extended south to Houston, crossing the Cotton Belt Railroad at Corsicana, and the International & Great Northern Railroad at Hearne.

“(7) The Missouri, Kansas & Texas Railroad, as constructed and operated from Denison, via Whitesboro, Fort Worth, and Waco, to Taylor, runs practically north and south, and the East Line & Red River Railroad, from Jefferson, runs a little north of west to McKinney. The branch of the Missouri, Kansas & Texas from Denison to Mineola, via Greenville, runs in a southeast direction, but not parallel with the East Line & Red River road, and not in the same general direction. Greenville and Mineola are east of south from Denison, in the direction of the Sabine River, and not in the direction of the Rio Grande.

“(8) The East Line & Red River road crosses the Denison & Mineola branch of the Missouri, Kansas & Texas at Greenville, and did so when said sale was made, but it does not, and never has, reached or connected with the main line of said road from Denison to Taylor, via Fort Worth and Waco—McKinney, the western terminus of the East Line & Red River road, being about twenty-five miles east of said main line: nor do the said main lines of the Missouri, Kansas & Texas Railroad and the East Line & Red River run in the same general direction.

“(9) That since the time of said sale respondent has failed and neglected to keep and maintain a public office in this state, and along the line of its road, for the transaction of its business, and the said Missouri, Kansas & Texas Railroad Company keeps its principal office in Sedalia, state of Missouri. That prior to said sale respondent kept such an office at Jefferson, Tex.

"(10) That since the time of said sale the stockholders and directors of said East Line & Red River Railroad Company have not in good faith held annual or any other meetings at any place on the line of said road. That nominally the stockholders have held annual meetings and elected directors, but these meetings were not held for the purpose of transacting any business concerning the management of the East Line & Red River Railroad by respondent, but for the purpose of technically complying with the law, in the interest of the Missouri, Kansas & Texas Railroad.

"(11) Since the time of said sale respondent has not operated or controlled any portion of its railroad from Jefferson to McKinney; and the same has been managed, controlled, and operated by the Missouri, Kansas & Texas Railroad, and the Missouri Pacific Railway Company, and no officer of respondent, elected in either good or bad faith, resides upon the line of its road, and no such officer or employe, acting in good faith for it, has taken any interest in or supervision over the management of said road since said sale to the Missouri, Kansas & Texas Railway Company.

"(13) That since said sale, and while operating and controlling the East Line & Red River road, the Missouri, Kansas & Texas Railway Company became a member of the International Traffic Association, the purpose of which was to make uniform rates for railway traffic, and to prevent competition among and between its members. This association was recently dissolved at New Orleans, where, I presume, its headquarters were. Respondent's road was affected by and included in the Missouri, Kansas & Texas Railway Company's membership of said association.

"(14) Of the last board of directors so nominally elected for respondent, as hereinbefore stated, one member is a director of the Missouri, Kansas & Texas Railway Company, another is an employe of said company, one is a local treasurer of, and two are attorneys for, the Missouri Pacific Railway system, which includes the roads of the Missouri, Kansas & Texas in Texas, and most of the others are either officers, directors, or employes of other railroads.

"(15) There is evidence that prior to said sale to the Missouri, Kansas & Texas Railroad, and while respondent's road was being constructed, it issued stock and bonds that were not for money, labor, or property actually received and applied to the purposes for which it was organized; and the testimony indicates that the bonded indebtedness, secured by mortgage on respondent's road, has been greatly increased since then without any corresponding benefit to this road.

"(15a) Disregarding their connections with other railroads

and lines of transportation, the East Line & Red River and the Missouri, Kansas & Texas Railroads were not competing roads when said sale was made. Considered with reference to such connections, they were competing roads.

"(16) The respondent's road was constructed from Jefferson to Greenville, reaching the latter place in 1880, and after the aforesaid sale the 32 miles of the road from Greenville to McKinney, which was under contract at the time of the sale, was completed, reaching McKinney in 1881 or early part of 1882. The entire line was constructed as a narrow-gauge road, using ordinary narrow-gauge rails."

The court then gives a statement, somewhat in detail, as to the manner of construction of that part of the road between Greenville and McKinney, and as to its condition, and upon this matter concludes as follows: "This road passes through a very rich and productive country, having a large population tributary to it, and McKinney and Greenville are large and flourishing interior towns, and Farmersville, midway between them, is a town of about 2,500 inhabitants; and because of the bad condition of this road, as above stated, the travel on it is very little, and the public are put to great inconvenience, persons sometimes having to go from Greenville to McKinney by way of Dallas or Denison, more than double the distance, and witnesses under process having to walk from Farmersville to McKinney to attend court. Wherefore it is held that for the past two years the condition of this portion of respondent's road has been such as to very considerably and at times entirely prevent it from performing its duties to the public, and from carrying out the objects and purposes of its creation."

No authority whatever is shown under which the Missouri, Kansas & Texas Railway Company can lawfully own or operate the line of railway from Denison to Mineola, which crosses respondent's line at Greenville. The judgment of the court below is based on the propositions: (1) That the attempted sale of the railway was unlawful, and that since its date respondent has failed to exercise the franchise conferred upon it by its charter; (2) that the condition of its road has not been such as to enable it to discharge to the public the duties assumed.

That respondent undertook, on November 28, 1881, to convey to the Missouri, Kansas and Texas Railway Company all its property and corporate franchises, of every character whatever, necessary to the conduct of the business for which it was created, except the mere franchise to be a corporation, until such time as, by the agreement of the parties, this might be taken away

Power of respondent to sell.

by dissolution, is not denied; but, on the contrary, it is claimed that this was done in the lawful exercise of power conferred on the two corporations. To authorize such a transaction, it must appear that the one corporation had power to sell and the other to buy. *East Line & R. R. v. Rushing*, 69 Tex. 306, 34 Am. & Eng. R. Cas. 367. Has respondent the power to sell by reason of anything appearing in its charter, or by reason of any law in force in the state? By the terms of its charter, given by special act of March 22, 1871, respondent was empowered "to join stocks or consolidate with any other railway company running in the same general direction." It was authorized by its charter to construct, own, and operate a railway from the city of Jefferson to the town of Greenville, and thence westwardly and north-westwardly, to the western limits of this state; in effect, a road across the northern part of the state whose general course would be westward. In view of this fact, as the power given was to join stocks or consolidate with a railway company running in the same general direction, the only fair construction to be given to so much of the charter is that it was thereby intended to confer power to make such an association with another railway company having a road which might constitute a part of the line of railway respondent was empowered to construct, own, and operate. That the company to whom the sale was made owned, or could own, a line of railway running in the same general direction, cannot be claimed; but, if this were otherwise, it could not well be held that the power conferred on respondent was a power to sell. The prohibition to "rent, sell, lease, or consolidate with any parallel or competing railroad in this state" does not confer a power to sell to another railway company owning a road not parallel or competing. The power to rent, sell, or lease to or consolidate with another railway company does not exist in the absence of legislation permitting these things to be done, and it cannot be implied from a prohibition extending only to parallel or competing roads. We further concur with the court below in the holding that railways, by reason of their relations, control, or management of other lines than their own, may become, within the meaning of the law, competing lines, though the railways owned by them may not in fact connect. Respondent had not power, under the terms of its charter or any other law in force in this state, to sell its road or any franchise conferred by its charter.

The Missouri, Kansas & Texas Railway Company was as clearly without power to buy the road owned by respondent as was it to sell. It was given power "to purchase, sell, lease, join stocks, unite, or consolidate with any connecting rail-

road company ;" but in determining what, within the meaning of the act, was to be deemed a "connecting railroad," we must look to the act through which alone it was empowered to own or operate a railway in this state. It is not to be presumed that the legislature ever contemplated that this corporation would assume, without legislative permission, the right to construct, own, or operate a railway within the limits of this state whenever it might seem advantageous to do so. The act, doubtless was passed at the solicitation of the corporation, and for the purpose of conferring on it the power, which otherwise it had not, to construct, own, and operate a railway whose lines were fixed by the act, and with reference to which its power to "purchase, sell, lease, join stocks, unite, or consolidate with any connecting railroad company" must be construed. That the Missouri, Kansas & Texas Railway Company had constructed, or could construct, a railway, under the act from which it derives all its power in this state to construct, own, or operate a railway, which connected with respondent's road as it was at the time the sale was made, cannot be claimed. We are of opinion that, within the meaning of the act,—the source of all the power that corporation has, in reference to matters now under consideration,—a company whose road did not connect with that which that corporation, under the power conferred upon it, had constructed or purchased, was not a connecting railroad company. That the Missouri, Kansas & Texas Railway Company may have operated a line of railway from Denison to Mineola, which crossed respondent's road at Greenville, cannot affect the question, for that was not a line contemplated by the act of August 2, 1870. If it had been shown that the line from Denison to Mineola had been built or purchased by that company, the result would be the same ; for the act does look to connections made through roads not built under it, though they may have been built by that corporation, nor does it look to connections made through lines which may be purchased by that company by reason of the fact that they connect with the road the company was authorized to construct. Any other conclusion would lead to a holding that by extending its connections that corporation could make, through such connections, every road in the state one connecting with that contemplated by the legislature at the time the act was passed.

So stands the question, if we look only to the charter of respondent, and the law under which the other corporation has power to construct, own, and operate a railway in this state. It seems, however, from the admissions in the answer

Powers of purchasing company.

of respondent, that the power of the one corporation to buy, and of the other to sell is to be tested by the laws in force in this state at the time of the trial; which renders it necessary to consider whether the laws before referred to conferred such rights as might not be taken away by subsequent legislation at any time before the powers therein given were exercised and rights thus acquired. The first two paragraphs of respondent's answer are as follows: "(1) It denies especially each and every allegation in said petition contained, except as hereinafter admitted, or confessed and avoided. (2) It admits its incorporation by special law of the state legislature of Texas, as mentioned in the state's bill, except that of 22d March, 1873, and of the last-named act defendant requires proof. It also admits that it is subject to such special laws as have been enacted, and to the constitution and general laws of the state now in force." There is nothing in the answer which withdraws this, but it seeks to show, if the acts complained of are in violation of the constitution and other laws, that under existing laws the acts charged against it do not authorize a forfeiture of its charter.

The state alleged that the company was subject to the provisions of the constitution and general laws in force when the proceeding was instituted, and the admission in the answer must be deemed an admission, if this were necessary to give full application to the provisions of the constitution, that the corporation had taken benefit of legislation subsequent to its adoption, and, in accordance with its provisions, thus became subject to all its provisions. Such an admission rendered it unnecessary for the state to make proof as to the reception of such benefits. Article 10, § 5, of the constitution, provides that "no railroad or other corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line." The court below found, on evidence that justified it, that respondent and the corporation to whom it sold were competing lines. The constitution forbade the sale. Since the sale, the road of respondent has been operated, controlled, and its franchises exercised by the officers of another corporation in whose selection its stockholders had no choice. It stripped itself of all property to enable it to discharge its duty to the public, and to this its

stockholders consented by a ratification of a contract which reserved to respondent no other right or franchise than "to be and remain a corporation until such time as may hereafter be agreed upon for its dissolution, [which] shall not be impaired or infringed upon by anything contained in this contract." The terms of the contract are suggestive of the fact that both corporations, or rather their officers and stockholders, were conscious that the contract between them was in clear excess of their powers, and in violation of the laws of this state. The Missouri, Kansas & Texas Railway Company is a corporation organized under the laws of another state, and respondent held its corporate existence and was organized under the laws of this state. Article 10, § 6, of the constitution, provides that "no railroad company organized under the laws of this state shall consolidate, by private or judicial sale, or otherwise, with any railroad company organized under the laws of any other state, or of the United States." Section 8 of same article provides that "no railroad corporation, in existence at the time of the adoption of this constitution, shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this constitution applicable to railroads." The contract in question having been made since the adoption of the constitution now in force, under the admissions in the answer, it must be held that it is in clear violation of section 6, before quoted.

In view of the facts proved to be true, it must be held that respondent, for nearly seven years before the information was filed, had ceased to exercise its corporate franchises, had parted with its property necessary to that end as far as it could, and had not even in good faith kept up its corporate organization; its highest officer resident at or attending to the business at its principal office being really but a claim agent for the purchasing company. In addition to this, as found by the court below, the road had been so far permitted to run down that it ceased to be able to carry out the objects and purposes for which the corporation was created. Sufficient cause was shown to justify a forfeiture of respondent's charter, if we look only to common-law grounds for such action. But it is contended that the legislation in this state shows that it is not intended such a penalty shall be imposed for such neglects of duty as are evidenced by the record before us. Article 10, § 3, of the constitution, provides that railroad companies organized under the laws of this state shall therein maintain a public office at which named business shall be transacted; that the directors shall hold within this state,

Failure to
exercise
corporate
franchises.

annually, one meeting, and that reports shall be made of its acts and doings to the governor or comptroller, as may be prescribed by law; and that "the legislature shall pass laws enforcing, by suitable penalties, the provisions of this section." For failure in these respects the legislature has prescribed penalties other than the dissolution of the corporation. 2 Sayles, Civil St. arts. 4115a, 4250. It is unnecessary, however, to consider in this case whether the mere imposition of a penalty will amount to a waiver of the right of the state to demand a forfeiture of the charter of a corporation for long and persistent non-user or misuser of its franchise; for the court below did not base its judgment on the failure of respondent to do any act for the doing of which the legislature has imposed a lighter penalty.

The constitution and statutes of this state contain the following provisions: The attorney general shall, "whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law." Const. art 4, § 22. Unless expressly otherwise directed by law, it is his duty to seek a judicial forfeiture of the charter of a private corporation which has, by non-performance of its chartered conditions, or the violations of its charter, or by any act or omission, misuser, or non-user, forfeited its charter, or any rights thereunder. Rev. St. art. 2805. "In case any corporation does or omits any act which amounts to a surrender or a forfeiture of its rights and privileges as a corporation, or exercises any power not conferred by law," information in nature of *quo warranto* may be filed. Acts 1879, p. 43. The Acts of 1879 contain the further direction that "in case any person or corporation against whom any such [information] is filed shall be adjudged guilty, as charged in the information, the court shall give judgment of ouster against such person or corporation from the office or franchise, and may fine," etc. The second section of the act of March 28, 1885, provides that "if, upon investigation, the attorney general shall find that there is reason to believe, or that it is probable, that any railway or other corporation is now carrying on business within this state, in violation of sections 5, 6, art. 10, of the constitution, he shall at once institute proceedings, by *quo warranto* or otherwise, in the court having jurisdiction of the cause or causes, against any corporation violating said sections and article of the constitution, and to enforce the penalties therefor." 2 Sayles, Civil St. art. 4247a, § 2. The fourth section of the act is: "If it shall be determined, by the court or jury trying any cause instituted under the provisions of this act, that the said sections and articles of the

Waiver of
right to
demand for-
feiture.

constitution are being violated, then the court shall enter such decree as will perpetually enjoin such violation; and, to the end of carrying into effect such constitutional provisions, may appoint a receiver to take charge of the affairs of the defendant corporation, until such time as the said corporation shall be reorganized, and in condition to be operated, within said provisions of the constitution." *Id.* art. 4247a, § 4.

It is insisted that this statute is applicable to the case before us, and that the only relief which can be given under it is an injunction to restrain the illegal act and the appointment of a receiver. To say the least, it is very doubtful if the statute last referred to has any application to the case before us; for it refers to corporations carrying on business in this state in violation of the sections of the constitution referred to, and might properly reach the case of the Missouri, Kansas & Texas Railway Company, which, under the findings, is carrying on a business in this state in clear violation of the spirit, if not the letter, of the constitution. The courts of this state would have no power to declare a forfeiture of the charter of that corporation granted by the laws of the state where it was created, but would have power to withdraw the franchise here granted, whenever the facts justified it, and, by injunction or otherwise, to prevent its carrying on business in this state in violation of its laws. They would also have power to place property controlled by it, and situated in this state, in the hands of a receiver, and to adjust the rights of such persons as might be shown to have valid claims against it, or even to await a valid incorporation in this state by those interested in property acquired by it in any lawful manner. If, however, the act had application to respondent, we see nothing in it which evidences an intention, on the part of the state, to waive the forfeiture of the charter of a corporation which has misused its franchise, or has failed to carry out the purpose for which it was created. That respondent's abuse of its franchise is evidenced by an act violative of the constitution, and that its non-user of its franchises may be attributable to that act, in this proceeding, becomes important as an aggravating fact indicating the willfulness of the act; but still the fact remains that the respondent used its powers for a forbidden purpose, which is a misuser of its franchise, and the further fact that it failed for a long time to exercise its corporate franchises to carry out the purposes for which they were given, such abuse and non-use of the corporate franchise gives common law grounds for a forfeiture of respondent's charter, and there is nothing in the statute which indicates that the state intended to

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waive its right to a forfeiture, and the court below correctly so held. No question was made in the trial court as to the necessity to join the purchasing railway company as a defendant; but had there been we do not see that it was a necessary party.

The last assignment of error is that "the court erred in holding that it had authority to appoint a receiver to take charge of the property and effects heretofore belonging to the respondent, but which, upon its dissolution by judgment of forfeiture, at once go to the stockholders of the concern, subject to the rights of creditors, especially those holding liens on the property; said stockholders or lienholders not being before the court, and not having been impleaded or cited in this case, so much of the act of July 9, 1879, as directs the rendering of such judgment, being contrary to the constitution of the United States, and of this state, and therefore null and void." Statutes in force in this state, regulating the appointment of receivers in such cases, provide that, "upon the dissolution of any corporation already created, * * * unless a receiver is appointed, * * * the president and directors or managers * * * shall be trustees of its property." Rev. St. art. 606. Court "may appoint a receiver to take charge of the affairs of the defendant corporation until such time as the said corporation shall be reorganized and in condition to be operated." Acts 1885, p. 66, § 4. Receiver may be appointed in cases where a corporation has been dissolved, or is insolvent, or on imminent danger of insolvency, or has forfeited its corporate rights. Acts 1887, p. 120, § 1, subd. 3. And his powers and duties are therein fully defined. There is nothing in this legislation violative of the right of any person or corporation. The property will go into the hands of such person as may be appointed receiver, subject to all just claims to it or upon it, and these may be adjusted in accordance with the well-settled rules applicable thereto. There is no error in the judgment, and it will be affirmed.

In re WASHINGTON STREET, ASYLUM & PARK R. CO.

(*New York Court of Appeals*, October 8, 1889.)

Horse Railways—Organization of Corporations.—Corporations for the construction of horse railways in the streets of any city of the state except

the city of New York, may be organized under the New York General Railroad Act of 1850.

Same—Consolidation of Corporations.—Under the provision of the New York Act of 1875, chap. 108, that two or more railroad companies organized under the laws of the state may consolidate, two or more street railroad companies may be consolidated notwithstanding the provision of the New York Act of 1869, chap. 917, § 7, which expressly excludes street railroads from the operation of the clause authorizing the consolidation of railroad companies.

APPEAL from General Term of the Supreme Court, Fourth Department.

Application by the Washington Street, Asylum & Park R. Co. for the condemnation of the right to cross the railroad of the Syracuse, Binghamton & New York R. Co.

D. S. Richards for appellant.

W. J. Welsh for respondent.

PECKHAM, J.—Two grounds for denying the prayer of the petitioner for the appointment of a commission have been argued before us. It has been urged (1) that the two original companies, whose valid consolidation is herein denied, were never themselves legally incorporated; and (2) if they were so incorporated, yet even then they could not become consolidated into a new corporation, because there is no law under which such consolidation could be effected. We think neither ground is well taken.

As to the first. Both corporations were organized under the general railroad act of 1850 and its amendments. It is claimed that such act does not relate to the incorporation of street railroads. This claim is at war with the generally received construction of the act. Ever since its passage, in 1850, or at least within a very few years thereafter, corporations for transporting passengers by horses as a motive power, over railroads in the streets of cities have been formed under and by virtue of the provisions of such act, and no doubt has thus far been suggested as to the validity of such corporations. Corporations thus formed are in existence in Brooklyn, Albany, Binghamton, Kingston, Cohoes and other cities of the state. There is nothing in the act of 1850 which prohibits (outside of the city of New York) such corporations from being formed under its provisions; and the language of the act is general, and broad enough to include corporations formed for such a purpose.

Incorporation
of street rail-
road com-
panies.

One or two expressions in opinions written by judges of this court have been cited as evidence that the general railroad act of 1850 had no application to street railroads. The cases from which these have been taken are New York Ca-

ble Co. v. Mayor, etc., New York 104 N. Y. 1-14; *In re* New York District R. Co., 107 N. Y. 42, 53, 54, 32 Am. & Eng. R. Cas. 202; *People v. Newton*, 112 N. Y. 396, 401. Each one of the above cases arose in New York city, and in regard to that city it is admitted that the general railroad act has now no application; for by chapter 10 of the Laws of 1860 it was made unlawful to thereafter lay, construct or operate a railroad in New York city, except under the authority of the legislature to be thereafter granted.

The remark of Judge RAPALLO in the the first cited case, that up to the time of the passage of the general surface street railroad act of 1884 there had been no law in force under which street railroads could be constructed, except the rapid transit act—the general railroad act of 1850 being inapplicable to street railways in cities—was not exactly accurate if applied to all the cities in the state, but was in entire accord with the truth in regard to the particular city (New York) which he was writing about, and in which the corporation existed whose rights were then under review. The inclusion of the other cities of the state was not in any way material to his argument, and was probably a mere inadvertent expression of the learned judge; the important fact being that the general railroad act of 1850 did not apply to street railways in the city of New York.

In the second case above cited, Judge FINCH makes the remark that we had held that the general railroad act of 1850 had no application to street railroads; and he refers to the case of the cable company, above alluded to. The same may be said of that remark, as I have just said, of Judge RAPALLO'S. It was made in relation to a New York company, which claimed the right to build its road under ground from the general railroad act of 1850, and it was stated that such act had no relation to street railroads; but that, if it had, the act of 1860, chap. 10, took it away, so far as New York city was concerned. It was New York city which was in the mind of the learned judge, and not the applicability of the general railroad act to street-railroad companies in other cities of the state. But he continued the discussion by expressly stating that the truth might be that the company derived its corporate existence from the act of 1850, but not its right to construct its contemplated road, because by the act of 1860 such right in New York city was thereafter to be the subject of special legislation.

In the last case cited, the question was not in issue, and the remark was a general one, that the act of 1850 gives no authority for the construction of street railroads, and, if it were limited to New York city, (by reason of the passage of

the act of 1860,) it is certainly a correct statement of the fact. It was made in reference to a New York corporation, and it was followed up by a statement that, if any right were gained by an organization under that act, the company was required to do the things mentioned in the opinion, and which, it was argued, left it without any authority to do the acts which it proposed to do. Not one of the learned judges had the exact question in mind as to the applicability of the act of 1850 to any city other than New York, and in regard to New York the remarks of each were correct. The question is entirely open in this court; and we have no hesitation in saying that corporations might be legally formed under the act in question for the transportation of passengers or freight, or both, over railroads in the streets of cities where horses were to be the motive power, excepting in the city of New York.

The legislature has recognized the general applicability of the law of 1850 to street railroads by the passage of the act, chap. 906 of the Laws of 1867, wherein it is enacted that § 32 of the Laws of 1850 shall not apply to horse or street railroads, except as thereafter provided—a clear implication that otherwise it would apply, and that the act generally did so apply. Undoubtedly, there are some provisions in the act which can only be applied to railroads where the motive power is steam, or some other power than horses; but that furnishes no argument against the application of any of its other sections to horse railroads. For more than 25 years, corporations of that nature have been formed under it, and no state officer whose duty it would have been to refuse to file such articles of association if the act did not provide for their organization has ever thus refused; but, on the contrary, there would seem to have been an uniform recognition of the right to file such articles, and of the legality of this kind of corporation thus formed. Such acquiescence and recognition on the part of the officers of the government are of very considerable, if not of controlling, weight in the interpretation of a general act of the legislature relating to public objects like the one under discussion. *Easton v. Pickersgill*, 55 N. Y. 310; *People v. Dayton*, *Id.* 367. The consequences of a different construction at this late day, and after an acquiescence of so long a time, would, or might be, disastrous in the highest degree to other interests existing and founded upon the legality of an incorporation for horse railroad purposes under the act of 1850: and this court would be reluctant to give such a construction to the act, unless called upon by the plainest language of the legislature,—so plain, indeed, that there could be no rational

Practical construction of statute considered.

argument advanced in favor of the other view. No such case is made out here. We conclude that the first ground for denying the prayer of the petitioner is untenable.

The second ground we think there is no force in. By the act of 1869, chap. 917, which authorizes the consolidation of

Consolidation
of street rail-
road com-
panies.

certain railroad companies, there was contained a clause in § 7 specially exempting street railroads from its provisions. Up to 1875, street railroads could not have taken advantage of the provisions of the act of 1869; but in 1875 the legislature passed an act entitled "An act in relation to railroad corporations," and being chapter 108 of the laws of that year. That act did not purport to be an amendment of the act of 1869, or of any act. It was original legislation upon the subject of railroad corporations, and the one subject was contained in the first section of the act, which provided that "in any case where two or more railroad companies shall have been, or shall hereafter be, organized under the general laws of this state, the whole of whose lines, as located by them, respectively, shall form one continuous and connecting line of road, the said companies may consolidate their lines of road, stock, franchises, and property according to the existing laws of this state relating to the consolidation of railroad companies." This act is no mere amendment of the act of 1869, nor does it purport to be so. The act of 1869, it is true, restricts the power to consolidate to a railroad company or corporation organized under the laws of this state, or of this state and any other state, and operating a railroad either wholly within, or partly within and partly without, this state; and it is true that the act of 1875 does not contain any such restriction upon a railroad company that may avail itself of the privileges conferred by the act, but it not only takes away the restriction contained in the act of 1869, that it must be an organization operating a railroad; for it goes further, and by affirmative language it includes any case where two or more railroad companies shall have been, or shall hereafter be, organized under the laws of this state. That provision is wholly inconsistent with the restriction contained in the seventh section of the act of 1869, which says that the provisions of that act shall not apply to street railroads.

It is true that repeals by implication are not favored; but, where the provisions of the later statute cannot have their full force and effect without the repeal of the former statute, such former statute must be deemed to be repealed by implication, or otherwise the plain intent of the legislature, as evidenced by its latest expression, is prevented from due operation by an inconsistent former statute. In such cases, where

the provisions are inconsistent, the later must prevail as the latest exhibition of the will of the law making power. By the first statute, the legislature said its provisions shall not extend to street railroads; by the second statute, it says that any railroad corporation, under the circumstances therein named, may consolidate according to the existing laws of the state relating to the consolidation of railroad companies. To restrict, therefore, this language to the same class of railroad corporations that were spoken of in the earlier statute, is to wholly fail to give effect to the plain language of the act. Full effect cannot be given to that language by merely saying that it shall include the case of railroad corporations which have not yet built, but have simply located, their road. That is one enlargement effected by the statute of 1875; but the other is equally plain. We think no importance is to attach to the fact that the legislature, between 1869 and 1875, passed one or two special acts allowing companies that were then constructing railroads to consolidate. Before the act of 1875, it required a special act to include such a case; but, after the act of 1875, companies then engaged in the construction of their railroads could consolidate under the provisions of that act, because the restriction contained in the act of 1869 was taken away, and all railroad companies organized as above stated were by that act permitted to consolidate.

It is unnecessary to continue the discussion further. The opinion delivered at the general term, we think, is entirely satisfactory upon the question, and we agree with the conclusions arrived at by that court. For these reasons the order of the general term should be affirmed, with costs to the petitioner, and the proceedings remitted to the special term for further action. All concur.

OWEN SOUND STEAMSHIP COMPANY

v.

CANADIAN PACIFIC RAILWAY COMPANY *et al.*

(17 Ont. Rep. 691.)

Traffic Agreement with Steamboat Company—Agreement to pay Minimum Sum.—By an agreement entered into between the plaintiff and the T., G. and B. R. Co., it was agreed that there should be certain joint rates chargeable to passengers and freight by the steamship company and the railway company to be divided in certain proportions; and if it should be found

40 A. & E. R. Cas.—38

that the proportion payable to the steamship company did not at the end of the season amount to the sum therein stipulated, then that the deficiency should be made good by a rebate from the share of the railway company; and, on the other hand, if the steamship company received more than the sums mentioned in the agreement, the railway company was entitled to a share of the surplus. Subsequently, an agreement was entered into whereby the T., G. and B. R. Co., leased its line to the O. and Q. R. Co., the latter agreeing to assume the contract with the plaintiff. This agreement was ratified by Act of Parliament. The O. and Q. R. Co. made a lease of its line to the Can. Pac. R. Co., which was confirmed by Act of Parliament, and by which Act the Can. Pac. R. Co. was to assume all contracts of the T., G. and B. R. Co., including the one with the plaintiff. *Held*, that, even if the agreement between the plaintiff and the T., G. & B. R. Co. was *ultra vires* the latter company, it was made valid by the subsequent legislation; but apart therefrom, it was not objectionable, as an undertaking on the part of the railway company to apply its funds to the payment of the steamship company.

THIS was an action brought on an agreement, bearing date the 7th July, 1883, made between the plaintiffs and the Toronto, Grey and Bruce Railway Company, respecting the running of certain steamboats therein mentioned, and providing for the distribution of the money received from freight and passengers.

At the close of the case the learned Judge directed judgment as follows:

"I direct the claim of plaintiffs in the fifth paragraph of the statement of claim to be dismissed. Reference to Mr. Winchester to take accounts of the dealings and transactions between the parties, and the amount due by one to the other for the season of 1883, upon the footing of the contract between the plaintiffs and the Toronto, Grey and Bruce Railway Company, including the guarantee of the latter of a minimum sum per diem. Also an account of the sums received by each party on account of the other during the season of 1884, the contract being treated for the purpose of the latter account as having terminated on the 4th January, 1884. Both parties moved on notice to set aside or vary the said judgment.

D. E. Thomson and *G. Bell* supported the plaintiffs' motion and shewed cause to the defendants'.

McCarthy, Q. C. and *G. T. Blackstock, contra.*

GALT, C. J.—The agreement contains a provision empowering the railway company to put an end to the arrangement in the beginning of the year 1884. Shortly after this agreement was made, viz., on the 26th July, 1883, an agreement was entered into between the Toronto, Grey and Bruce Railway Company, and the Ontario and Quebec Railway Company, whereby the former agreed to lease their line of railway to the lat-

Agreement
upon which
suit is
brought.

ter, and the latter agreed to assume "the contract between the Toronto, Grey and Bruce Railway Company, and the Owen Sound Steamship Company for the line of steamers "Magnet," "Spartan," and "Africa." This agreement was ratified by an act of the parliament of Canada, passed on the 19th April, 1884. On the same day an act was passed entitled "An Act to confirm the lease of the Ontario and Quebec Railway to the Canadian Pacific Railway Company, and for other purposes." By this act the Canadian Pacific Railway Company assume all contracts entered into with the Toronto, Grey and Bruce Railway Company. The lease thereby ratified was executed by the lessors on 4th January, 1884, and by the lessees on 23d January, 1884. It is under these agreements this action is brought against these defendants who were no party to the original agreement.

By the third paragraph of the statement of claim, the plaintiffs allege "that the said freight and passenger traffic shall be carried on and charged for in accordance with the rates set forth in the schedule annexed to said deed, and that the receipts from the said freight and passenger, interchanged between the said Toronto, Grey and Bruce Railway Company, and the plaintiffs, should be divided between them in the proportion set out in the said schedule of rates, and that the aggregate amount of the gross receipts of the plaintiffs during the season of navigation in each of the years 1884 and 1885," (this is evidently a mistake, as it omits the year 1883), "should be for the steamer 'Magnet,' \$160 per day; for the steamer 'Spartan,' \$160 per day, and for the steamer 'Africa,' \$110 per day; and that the said Toronto, Grey and Bruce Railway Company should, in the event of all the receipts of the plaintiffs not amounting during each season to the amount so agreed upon, allow and pay to the plaintiffs, by way of rebate, from the receipts of the said railway company, on all traffic interchanged as aforesaid, a sum sufficient to make the gross receipts of the plaintiffs up to the amount so agreed upon." The fourth paragraph is not disputed. The fifth paragraph contains the same objections as the third; but claims for breaches of the agreement after February, 1884. As the learned judge held at the trial that the agreement was at an end after February, 1884, he dismissed this claim; and, as I am of the same opinion, it is unnecessary to set out this paragraph. The sixth and seventh paragraphs then claim for moneys due on the said steamers, and for money not paid by the defendants to the plaintiffs on the accounts between them.

The defendants in their first paragraph admit the contract; but contend that the Toronto, Grey and Bruce Railway Com-

pany had no authority to enter into such contract; and that in consequence the defendants are not bound by the terms of it. This in reality is the sole ground of contention. There are other paragraphs setting out the correspondence proving that the contract was put an end to; but it is unnecessary to set them out.

I have already said, in referring to the statement of defence, that the defendants have set out the correspondence respecting the termination of the contract in January, 1884, and I fully concur in the opinion expressed by the learned judge that the agreement was thereby concluded. This disposes of the motion of the plaintiff.

The objection made by the defendants rests entirely on the question whether the agreement was *ultra vires* the Toronto, Grey and Bruce Railway Company; and, if so, whether they are bound by the stipulation to pay a minimum rate to the steamer. It is not disputed that a reference must be had as to the accounts between the parties.

I will assume for the moment that the railway company were not authorized to pledge the earnings of the railway; in other words to agree that in case of a deficiency in the earnings of the steamboat company the deficiency should be made up out of the joint receipts; and, if so, then the case of *Colman v. Eastern Counties R. Co.*, 10 Beav. 1, would apply, had an application been made by a shareholder to restrain the

directors from entering into such a contract; but this is not so, no complaint is made by any shareholder of the company, and, in fact, so far as the shareholders are concerned, they had ceased to have any interest in the matter within a fortnight after it was made, for on 26th July, 1888, the defendants, the Ontario and Quebec Railway Company, had entered into an agreement with the Toronto, Grey and Bruce Railway Company to lease their railway at a certain fixed rent, and had expressly agreed to assume this contract described in the schedule as "contract between the Toronto, Grey and Bruce Railway Company, and the Owen Sound Steamship Company, for the line of steamers "Magnet," "Spartan," and "Africa."

It is to be assumed that when the Ontario and Quebec Railway Company assumed this lease they had made themselves acquainted with the provisions contained in the contract; and moreover they applied to the legislature to confirm this lease and agreement, which was done by 47 Vic. chap. 61; they availed themselves of the services of the said steamers for the year 1883, and are in my opinion estopped from denying its validity so far as the transactions of that year are concerned. Then as to the defendants the Canadian

Pacific Railway Company. By an agreement executed by the Ontario and Quebec Railway Company on 4th January, 1884, and by the Canadian Pacific Railway Company on 23rd January, 1884, the Canadian Pacific Railway Company expressly assume all contracts entered into by the said Toronto, Grey, and Bruce Railway Company in relation to operating the traffic of the said last mentioned company's line, and of all rentals and charges in connection with any wharves, steamers, lands, or other property or equipment "used by or service rendered to the said Toronto, Grey, and Bruce Railway Company in connection with the operation of its line, the whole as more particularly set forth in the deed of lease of the Toronto, Grey, and Bruce Railway Company to the lessors hereinbefore referred to, and in the schedule thereto annexed." This schedule embraces the agreement now in question. This lease was ratified by the Act 47 Vic. chap. 54, (D.) and is, in my opinion, conclusive against these defendants.

I have been considering the case, assuming the agreement with the plaintiffs to be *ultra vires* of the Toronto, Grey, and Bruce Railway Company; but in my opinion, the agreement is unobjectionable. There is no undertaking on the part of the railway company to apply any of their funds to paying the steamship company.

Agreement
held not *ultra*
vires.

The agreement amounts to this: there shall be certain joint rates chargeable to passengers and freight by the steamship company and the railway company, to be divided in certain proportions, and if it should be found that the proportion payable to the steamship company did not at the end of the season amount to the sum therein stipulated, then that the deficiency should be made good by a *rebate* from the share of the railway company; and, on the other hand, if the steamship company received more than the sums mentioned in the agreement, the railway company were entitled to a share of the surplus. This is manifest from the provision at the end of the thirteenth condition of the agreement; "And it is further agreed that the accounts of the said company shall, as far as practicable, be adjusted monthly, and the final adjustment shall be made, and the above *rebate*" (this refers to both the cases I have mentioned) "allowed, and the balance due to either party paid over at or as soon as may be after the close of the navigation in each season."

Both motions must be discharged. There will be no costs.

ROSE, J.—On the argument I was convinced that the agreement had been put an end to by the notice, and that the plaintiff company had so treated it, and only fell back upon it, or endeavored to do so, when satisfactory arrangements

could not be come to, in order to perfect a new agreement. Further consideration has confirmed me in that view; and I cannot feel any doubt that as to it my learned brother STREET arrived at the proper conclusion at the trial.

Termination
of contract.

Upon the question of *ultra vires*, I am inclined to accept the view of the learned Chief Justice, that the agreement to secure to the plaintiff company a minimum sum out of the joint earnings was not within the objection taken, as it may well be urged that the fund out of which the amount would be paid would not have been in existence but for the agreement. The general assets of the railroad company were not pledged by the agreement, but only the fund created by the joint venture, *i. e.*, the joint earnings, and so long as the claim is confined by the agreement to such sum, it is difficult to apply the reasoning of the cases cited to the argument of *ultra vires*. As to the agreement by the railway company to give all the traffic to the plaintiff's company, which was urged to have been in contravention of sec. 60 of the Consolidated Railway Act of 1879, it is clear that such section is not applicable, as it refers to railway companies only.

Agreement
intra vires.

But whether any difficulties, such as suggested, existed at the date of the agreement, it seems to me clear beyond reasonable doubt that the effect of the legislation, chaps. 54 and 61 of 47 Vic., (D.) was to remove all question—to validate all that otherwise would have been invalid—and to empower the railway companies to carry out the agreement in question, which agreement was sufficiently referred to in the Acts, and which I cannot doubt it was intended should be embraced in the vitalizing clauses of the Acts.

As to the costs, I also agree as to what was done by my learned brother STREET, even were his discretion a proper subject for review. The railway companies opposed the whole claim of the plaintiff as to the minimum sum and so the hearing or trial was necessary. So far as the plaintiff company increased such costs by its unsuccessful claim, the order has protected the defendants.

I agree that the motions should be discharged without costs.

MACMAHON, J., concurred.

Power of Railroad Company to Quarenty Gross Earnings of Steamboat.—See Green Bay & M. R. Co. v. Union Steamboat Co. (U. S.), 13 Am. & Eng. R. Cas. 658.

BRISCOE

v.

SOUTHERN KANSAS R. CO.

(U. S. Circuit Court, W. D., Arkansas, October 5, 1889.)

Indian Territory—Stock Killing—Jurisdiction of Court.—Under the provision of the act of congress of July 4, 1884, which confers upon the United States circuit court for the western district of Arkansas, jurisdiction "over all controversies arising between said Southern Kansas R. Co. and the nations and tribes through whose territory the said railroad shall be constructed," the circuit court has jurisdiction of an action to recover damages for the killing of cattle by the negligence of the company's servants in operating its railroad.

Same—Suit Arising under Federal Law.—The Southern Kansas R. Co. being authorized to construct its railroad through the Indian Territory by act of congress, such claim for damages is a suit arising under a law of the United States.

Lease—Liability of Lessor for Negligence.—If a railroad company, without legislative authority, executes a lease of its railroad, it is not thereby released from liability for damages caused by the negligence of the lessee company in operating it.

Same—Authority to Execute Lease.—Although the Southern Kansas R. Co. is organized under the laws of the state of Kansas, and by the laws of that state is authorized to lease its railroad, such authority does not confer upon it power to lease a part of its railroad situated beyond the limits of the state, and constructed through the Indian Territory pursuant to the powers conferred by an act of congress.

Same—Implied Authority.—The use of the words "successors and assigns" in a statute conferring authority to a railroad company to construct its road, does not impliedly authorize the company to execute a lease, which deprives it of the power of fulfilling its corporate functions.

THIS is an action at law brought by plaintiff to recover damages of defendant for the killing of his horses by the carelessness and negligence of defendant's agents or servants in running its engine and train of cars over said horses, when the same could have been avoided by the exercise of reasonable care on the part of such agents or servants. The defendant filed its answer, denying the allegations of plaintiff's complaint as to the negligent killing, and setting up that before the killing of said horses defendant had leased its road for 99 years to the Atchison, Topeka & Santa Fe Railroad Company; that the control and management of said railroad was entirely in the hands of the lessee, and the running of trains

over it was by the agents and servants of the lessee, and the defendant had nothing to do with such control, management, or the running of trains on said road. The case was tried. Verdict for plaintiff. Defendant filed its motion for new trial, and in it complained specially that the court erred in instructing the jury that the lease of defendant to the Atchison, Topeka & Santa Fe Railroad Company was unauthorized by law, and therefore void, and that, such lease being void, the lessor was not free from liability for the negligent acts of the lessee. The motion for new trial was overruled. The other points raised in the case fully appear in the opinion of the court.

Barnes, Mellette & Boudinot for plaintiff.

Duval & Cravens, Geo. R. Peck, A. A. Hurd and Robert Dunlap for defendant.

PARKER, J.—The first question is, did the eighth section of the act of congress of July 4, 1884, give the plaintiff the right to bring a suit in this court? The section is—

Jurisdiction of court. "That the United States circuit and district courts for the western district of Texas, the western district of Arkansas, and the district of Kansas, and such other courts as may be authorized by congress, shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between said Southern Kansas Railroad Company and the nations and tribes through whose territory said railway shall be constructed. Such courts shall have like jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said railway company; and the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory, without distinction as to citizenship of the parties, so far as may be necessary to carry out the provisions of this act." Counsel for defendant contend that the last clause of the section, to-wit, "so far as may be necessary to carry out the provisions of this act," is a limitation to the section of such a nature as to limit the jurisdiction of the federal courts to such controversies as may arise between the tribes or nations through whose territory the road is constructed and the inhabitants of such tribes and nations to matters necessary to carry out the provisions of the act,—in other words, it limits it to such suits between the tribes and nations, or members of the tribes and nations, and the railroad company, as may arise under the act granting the right of way, and pertaining to the right of way, and damages for the same; and that the same cannot be extended to a suit to recover for a common law tort, a recovery upon which depends in no manner whatever upon

the construction of the act granting the right of way to the railroad company.

If this proposition is true, the nation or tribe, or the inhabitants thereof, were left by congress without any remedy for torts committed by the railroad company; for, as there is no remedy for torts such as was sued for in this case at the place where the same was committed, there could be no remedy anywhere. As the plaintiff could not sue in the Indian country, he could not sue anywhere. *Le Forest v. Tolman*, 117 Mass. 109. It is there decided, by Justice GRAY, that to maintain an action of tort founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must be actionable or punishable by the law of the place in which it is done. The latest case on this subject is *Carter v. Goode*, 50 Ark. 156, where the doctrine that is well sustained by American and English law, as announced in the case of *Le Forest v. Tolman*, was fully and clearly recognized. Then the plaintiff was remediless, unless the provisions of this act gave him a remedy. The nations of Indians through whose lands the 120 miles of the Southern Kansas Railroad passes have many rights that may be destroyed or affected by the tortious acts of the defendant. There are many resident Indians and many lawful residents in these nations who are not Indians. They have rights that may be affected or destroyed by the torts of the defendant. Did congress intend that this road should obtain from the United States the franchise which gave it the right to build its road, own it, run it, and receive its earnings, and the lawful residents of this country, for a distance of 120 miles, were to be left without a remedy for an injury to personal property, no matter how great the same might be, caused by the negligent and tortious conduct of defendant's agents? This is hardly to be presumed. Unless there is an entire absence of any language in the act which will, by a reasonable construction, warrant the conclusion that it was the purpose of congress to afford a remedy, the act must be construed to harmonize with the purpose of congress to promote the right and secure justice by affording a means of redress to the lawful inhabitants of these nations for a tortious act committed by defendant. The language of the eighth section is: "Such courts shall have like jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said railway company." Over all controversies is very comprehensive. This is one of the provisions of this act, to which jurisdiction, without distinction as to citizenship of parties, is extended to the courts to

carry out. Mr. Briscoe, the plaintiff, upon the proof, is an inhabitant of the Chickasaw nation. His *status* as such is defined by Bouvier, (volume 1, p. 709,) where he says: "An inhabitant is one who has his domicile in a place." Briscoe had his residence at Purcell, in the Chickasaw nation, and it was his legal residence, as he was living there upon a permit. That was his fixed abode. He had none other. Therefore he was an inhabitant by authority of the case of *In re Wrigley*, 4 Wend. (N. Y.), 603, and in fact by all the authorities.

To give this court jurisdiction, the right to claim it must grow out of the subject-matter. It must be a suit or a case

arising under a law of the United States. When
Subject mat- is it a suit arising under a law of the United States?
ter of suit.

When it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of a law of the United States, or sustained by the opposite construction, the case will be one arising under a law of the United States, and one of which the federal courts have jurisdiction, regardless of the citizenship of the parties. *Cohens v. Virginia*, 6 Wheat. (U. S.), 264; *Osborn v. Bank of the United States*, 9 Wheat. (U. S.), 758; *Starin v. New York*, 115 U. S. 257, and authorities there cited; *Germania Ins. Co. of New Orleans v. Wisconsin*, 119 U. S. 473, 15 Am. & Eng. Corp. Cas. 407.

As far as this defendant has rights in the Indian country, it is equivalent to a corporation created by an act of congress; or, if this cannot be said to be true, it is a recognition, to the extent provided by the act of congress, of a corporation in existence, having been created under the laws of Kansas; and upon this corporation, by this act of congress, there is conferred the right to build and run its road through the Indian country, and exercise all the ordinary powers incident thereto. Every right defendant has in the Indian country it obtained from the act of congress. This, by the doctrine of the case of *Osborn v. Bank of the United States*, 9 Wheat. (U. S.), 739, raises a federal question. I think this doctrine is abundantly sustained by the Removal Cases, 115 U. S. 11, 20 Am. & Eng. R. Cas. 324. Mr. Justice BRADLEY, in these cases, said: "The exhaustive argument of Chief Justice MARSHALL, in the case of *Osborn v. Bank of the United States*, 9 Wheat. (U. S.), 738, * * * renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States."

The case is one arising under a law of the United States, and consequently there would exist a federal question. If a federal question exists when the corporation is one created un-

der the laws of the United States, when a corporation already created under the laws of a state is permitted by an act of congress to enter a country over which the United States has jurisdiction, and there to exercise the ordinary powers of a railroad corporation, this would create a federal question, as well as in the other case. But the fact that a federal question exists in the case has a more reasonable foundation than this. Here is a right that for the first time becomes a perfect right by its receiving a legal recognition by the provision, for the first time of a remedy by this act of congress. Until this time it was a remediless right, and, practically, was therefore no right, as a right without a remedy is practically no right. Here a remedy was for the first time given by a law of the United States, and thus the right, as having an existence, was for the first time recognized by the lawmaking power, and provision was made by such power for its enforcement. This gives the plaintiff a right or privilege which arises under a law of the United States, and gives him the right to come into the federal court to enforce the right, the same as though the right itself had been created by an act of congress. Why does not jurisdiction exist in a court of the United States as well where the act of congress for the first time gives a right of action as when it creates a right? In either case it is the existence of a claim to a right or privilege that is founded upon a law of congress. In either case it is a case arising under a law of the United States. In such a case a party comes into court to demand something conferred on him by a law of congress.

The proof in this case shows that, before the killing of the horses of Briscoe, the Southern Kansas Railroad Company had leased, for a period of 99 years, its road to the Atchison, Topeka & Santa Fe Railroad Company, a corporation created under the laws of Kansas; that the management of the said Southern Kansas Railroad, and the running of the same, was by the employes of the Atchison, Topeka & Santa Fe Railroad Company; that the defendant had nothing to do with the running of trains or the management of the road in the Indian country; that for this reason the defendant is not liable to plaintiff. If the Southern Kansas Railroad Company had the proper legal authority to execute the lease made by it to the Atchison, Topeka & Santa Fe Railroad Company, and in pursuance of such authority it had made the lease, and turned over the control and management of the road to the lessee, I believe the true doctrine is that it would not be liable for damages caused by the torts of the lessee. An authorized lease, without any exemption clause, absolves the lessor from the torts

Liability of
lessor for
negligence.

of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. *Nugent v. Boston, C. & M. R. Co.*, 6 Am. St. Rep. 151, 38 Am. & Eng. R. Cas. 52. A railroad company whose road is operated by a lessee in the name of the lessor is liable to third persons for the lessee's negligence, unless absolved therefrom by legislative authority. A railroad company has no power to lease its road so as to relieve itself from liability for the non-performance of duties devolving upon it, in the absence of legislative authority, expressly given. *Ohio & M. R. Co. v. Dunbar*, 71 Am. Dec. 291. The franchises of a railroad company are intended to be exercised for the public good. This is why they are granted. A corporation cannot absolve itself from the performance of its obligations to the public without the consent of the legislature, expressly given. *Singleton v. Southwestern R. Co.*, 48 Am. Rep. 574; 21 Am. & Eng. R. Cas. 226; *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.), 90. That the lessor is absolved from liability by legislative authority, in effect, when the lease is authorized by law, I believe to be the true doctrine.

It is claimed by defendant that it had authority to make the lease; and this authority is derived from the act of congress which authorized the building of the road through the Indian nations; and, if the authority is not to be found there, that it existed by virtue of the authority of the laws of Kansas, under which it held its charter. It is clear to my mind that the authority to lease is not given by the act of congress of July 4, 1884, which gave the defendant the right to build its road through the lands of the Indian nations. This authority, under this act, is claimed by virtue of the tenth section thereof. This section declares that "the said Southern Kansas Railway Company shall accept this right of way upon the express condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort tending towards the changing or extinguishing of the present tenure of the Indians in their land, and will not attempt to secure from the Indian nations any further grant of land, or its occupancy, than is hereinbefore provided. This is the only part of the act that mentions the word "assigns." There is no express power to lease the road in the act. The use of the words "assigns" and "successors" in the tenth section of the act does not necessarily imply that the corporation can transfer all of its property and franchises to another corporation by lease. *Oregon R. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 39 Am. & Eng. R. Cas. 176. *Thomas v. West Jersey R. Co.*,

**Authority to
make lease.**

101 U. S. 71; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 24 Am. & Eng. R. Cas. 58. By these authorities the principle is enunciated, "That, unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or other contract, turn over to another company for a long period of time its road, and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to secure and operate such road, franchises, and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and it is not to be presumed from the usual grant of powers in a railroad charter." Under this rule there is clearly no right given to the Southern Kansas Railroad Company by the act of congress to lease its road. It simply recognized the existence of this company as a Kansas corporation, and gave it certain rights in the Indian country,—such as the right to build its road through such country, and exercise all the ordinary powers incident to the ownership, construction, and operation of its road.

But it is claimed that its Kansas charter gives it the right to lease its road. If this road was in Kansas, the position would be well taken. The power to lease the road in Kansas would exist. "A state cannot, by chartering a corporation, confer upon it a legal right to act within the jurisdiction of another state." 2 Mor. Priv. Corp. § 958. It is a fundamental principle that the laws of a state can have no binding force *proprio vigore* outside of the territorial limits and jurisdiction of the state enacting them. Section 959, *Id.* The charter of this road, or the laws of Kansas under which it exists, does not give it the right to exercise its powers beyond the state of Kansas. Its powers under its Kansas charter cannot be exercised in the Indian country unless permitted to be exercised by the act of congress; and they can be exercised only to the extent so permitted. In the case of *Runyan v. Coster's Lessee*, 14 Pet. (U. S.) 122, and in *Bank of Augusta v. Earle*, 13 Pet. (U. S.), 519, the supreme court of the United States said: "Every power which a corporation exercises in another state depends for its validity upon the laws of the sovereignty in which it is exercised." It was further held, in the above cases, that a corporation can make no valid contract without the sanction, express or implied, of the laws of such sovereignty. It is decided in *Bank of Augusta v. Earle*, 13 Pet. (U. S.), 524, that courts of justice have always expounded and executed contracts according to the law of the place in which they were made, provided that

Effect of Kansas statute.

the law was not repugnant to the laws or policy of their own country. The court, in the above case, held the rule to be "that, by the comity of nations, foreign corporations are allowed to make contracts under their respective limits not contrary to the known policy of such nations, or injurious to their interests." This gives a railroad corporation the right to exercise all its ordinary powers growing out of its franchise, such as making contracts in regard to the transaction of its business, as was the case in *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 14 Am. & Eng. R. Cas. 581. But when it undertakes by a lease of its road to get rid of its responsibility or liabilities to the public, which it assumed when it accepted the franchise, it would be exercising an extraordinary power, which may be greatly prejudicial to the public, and therefore is contrary to the known policy of a state, and injurious to its interests, and cannot be exercised unless the state, by express authority conferred, authorizes it to be done.

The execution of a contract of lease by the defendant by which it parted with its franchise for three generations is not among its ordinary powers. I take the rule to be, in this country, that the ordinary powers vested by the law of its creation may be exercised anywhere by the rule of comity. The granting of this franchise in the Indian country by congress was the granting of a right in which the public has a large interest. Railroad companies being public corporations so far as to be subjected to control by legislation, they can do no act which would amount to a renunciation of their duty to the public, or directly and necessarily disable them from performing it. They cannot, therefore, convey away their franchises and corporate rights. But they may "contract debts, purchase on credit, and mortgage their personal property not affixed to the road, though used in operating it," as these would be but the exercise of their ordinary powers. 1 Wat. Corp. 589. There is nothing in the act of congress authorizing the defendant to build its road permitting it to lease it. The laws of Kansas granting the extraordinary power to defendant to lease its road cannot operate beyond the sovereignty of Kansas. Before defendant could lease its road in the Indian country it must have the consent of the other party to the contract,—the United States. This consent must be expressly given. It might be given by the act of congress directly, by the use of appropriate words in the act, or by the adoption of the power in the Kansas charter; but it has done neither, and therefore, as far as the public is concerned, it does not exist. I am not deciding what these two companies may do as affect-

ing each other, but simply, as far as the public is concerned, this act of leasing is an unauthorized lease. This being so, the defendant company is liable to third parties for damages occasioned by the tortious acts of the lessee of defendant. The motion for new trial, for the reasons above given, must be overruled; and it is so ordered.

STATEN ISLAND RAPID TRANSIT CO.

v.

MAYOR, ETC., OF THE CITY OF NEW YORK.

(*New York Court of Appeals, January 14, 1890.*)

Lease of Ferry—Percentage of Earnings.—The lease of a ferry provided that the lessor should be entitled to a percentage of the gross receipts. The only provision as to the rate of fare was that it should not be less than five cents. The lessee also owned a railroad which connected with the ferry. The same charge was made for transporting persons who simply desired to cross the ferry as for transporting those who also travelled by the railroad. *Held* that the lessor was not entitled to a percentage of the whole fare charged for transportation over both the ferry and the railroad, but only to a percentage upon such sum as fairly represented the proportionate earnings of the ferry.

APPEAL from General Term of the Supreme Court, First Department.

Action by the Staten Island Rapid Transit Co. against the Mayor, Aldermen and Commonalty of the City of New York, to construe the lease of the Staten Island ferry. The general term affirmed the judgment of the special term, (see 2 N. Y. Supp. 680; 5 N. Y. Supp. 575,) and the defendant appeals.

D. J. Dean for appellant.

W. W. MacFarland for respondent.

FINCH, J.—Under both leases of the ferries the lessees were only bound to run their boats to Staten Island. They were free to choose their port of arrival and departure, and were at liberty to have but one. They chose to have but one, and selected St. George as that one, it being the nearest point to New York. The passengers landed there who desired to go further were carried there by rail to points on the north and east shore. The lessees of the

Gross earnings of ferry.

ferry were also the owners of the railroad. That ownership was theirs absolutely, and the lines owed no tribute to the city of New York. If, under the old system, the boats coasted both shores, no law prevented a change, and the leases imposed no objection beyond a ferry to the island. The lessees were bound to pay certain percentages on the gross ferry receipts. They were not bound to pay upon the railroad receipts.

Where one sum was paid for one passenger over the ferry and over the railroad, that did not make the whole of such sum ferry receipts. The ferry owned part, and the railroad part; and the only question possible would be one of equitable division and distribution. The lessees made such distribution. So far as we can see, it was a fair division of the total charge between the ferry on the one hand and the railroad on the other. The city had full knowledge of it. By its commissioners of accounts it investigated the books of the lessees, ascertained the division made, assented to the basis adopted, and thereafter accepted the percentages founded upon that division. But all this time the city, it seems, was asleep, and at last woke up. Its officers knew that the lessees charged 10 cents for every passenger carried to St. George, and 10 cents to his destination for every passenger who crossed the ferry and went on over the Rapid Transit Lines, and insisted that the latter 10 cents was like the former—all ferriage and gross receipts of the water route. For the purpose of tribute to the city the railroad had no fares, but ran for nothing. The argument may be formulated thus: The lessees charge a passenger to St. George 10 cents. That, therefore, is the rate of ferriage. If they take another passenger to St. George, and then beyond on the railroad, also for 10 cents, the ferriage remains the same, and the railroad fare is nothing. The argument assumes that the lessees carry both passengers across the water for the same price. They do not. The railroad fare, by itself, is 5 cents, or just half of the whole sum paid. In other words, the passenger who stops at the shore pays 10 cents for his ferry passage, but he who goes inland over the railroad pays 5 cents for his ferry passage and 5 more for the railroad fare. To such passengers the ferriage is reduced one-half. The leases permit it. One of them fixes no minimum rate of ferriage, and the other makes it 5 cents. Below that the lessees have not gone. They have a right to carry passengers for 5 cents across the water, and they do carry one class of them for that, because they pay as much more to the railroad. The trouble is, and is only, that they charge other passengers, who stop at St. George, 10 cents. The corporation counsel concedes that the lessees might charge all passengers alike 5 cents ferriage, and, if it did that, the city could not and would not complain.

The objection, then, is, at bottom, that the lessees discriminate between their passengers, and charge one man twice as much as another. Is it the business of the city, as lessor, to redress that wrong, if it be one? Is it the general guardian of all the common carriers within its limits? If the discrimination is wrong, it is a public wrong, and not at all one to the city, in its character of lessor. Its complaint in that character strikes me as at least odd. It is that, instead of charging 5 cents ferriage for every passenger, and so reducing the basis of the city's revenue, it obstinately persists in charging some passengers 10 cents, and so increases the city's revenue from the ferriage. Passing by the moral attitude of such a claim, its business attitude, as between lessor and lessee, is indefensible. If there is discrimination, the city gets the benefit of it, and cannot question what does not harm it, and what its contract permits. So far as lessor and lessee are concerned, the only question is what have been in truth and in fact the actual ferry receipts, not what they ought to have been or might have been; and so whether the ferry fare to railroad passengers has been actually reduced to 5 cents, or kept, as to those passengers, at 10 cents, the Rapid Transit fare being nothing. The situation itself, and the acts of the parties in respect to it, are sufficient to settle that question as it was settled by the courts below. The city's contention, if successful, would necessarily end in one of three things: Either all ferriage would drop to 5 cents, so as to leave 5 more for the Transit Line, in which case the gross receipts, and so the city's percentage, would be reduced; or the price to railroad passengers would go to 15 cents, because the ferriage alone must be 10, and the railroad could not run for less than 5, in which case the public welfare, for which the city pleads, would suffer; or the lessees would be obliged to pay to the city a percentage upon their railroad as well as their ferry earnings, which would be clearly unjust. We think the parties themselves settled the matter upon a fair basis, and adopted a just construction. The judgment should be affirmed, with costs. All concur.

40 A. & E. R. Cas.—39

Pou

v.

COVINGTON & MACON R. CO.

(*Georgia Supreme Court, January, 24, 1890.*)

Mechanic's Lien—Notice to Owner—Service on Agent.—Under the Georgia Act of 1873 (Ga. Acts, 1873, p. 44) which provides that mechanics' liens shall attach upon the real estate improved "as against such true owner, upon written notice given to him," notice to the agent of a railroad company whose principal place of business is not within the county where the agent resided at the time the notice was served, is not notice to the "owner" within the meaning of the statute.

ERROR from Superior Court, Morgan County.

Foster & Butler for plaintiff in error.

W. S. McHenry for defendant in error.

BLANDFORD, J.—Mrs. Pou, the plaintiff in error, furnished materials to a contractor of the defendant in error for the erection of a certain building upon a lot belonging to the defendant in error in the town of Madison. She recorded her lien against the contractor, and served a notice thereof upon a certain person who is alleged to have been the agent in Madison of the defendant in error. Afterwards she brought her action against the defendant in error and the contractor to recover the value of the materials thus furnished to the contractor, and to enforce her lien against the premises of defendant thus improved by the materials furnished to the contractor. The declaration was demurred to by the defendant in error on the ground that proper notice had not been given to it by the plaintiff in error, the notice having been served merely upon an agent, or a person called an "agent," of the defendant in error. The court sustained the demurrer and dismissed the action as to defendant in error.

The act of 1873, (Acts 1873, p. 44,) as embraced in the code, § 1979, provides that "all mechanics of every sort, who have taken no personal security therefor, shall, for work done and material furnished in building, repairing,

Statute.

or improving any real estate of their employers; all contractors, material men, and persons furnishing material for the improvement of real estate; all contractors for building factories, furnishing material for the same, or furnishing machinery for the same; and all machinists and manufacturers of machinery, including corporations engaged in such business, who may furnish or put up in any county of this state any steam-mill or other machinery, or who may repair the same; and all contractors to build railroads,—shall each have a special lien on such real estate, factories, and railroads. When work done or material furnished for the improvement of real estate is done or may be furnished upon the employment of a contractor, or some other person than the owner, then, and in that case, the lien given by this section shall attach upon the real estate improved, as against such true owner, upon written notice given to him, stating the amount claimed, before he settles with or pays such contractor or employer, and, when he has settled or paid in part only, for the balance still unpaid at the time of such notice."

Under this section of the Code, before any lien can attach upon real estate for material furnished a contractor for the improvement thereof, written notice must be given to the true owner. In this case notice was given to an agent, and to the owner. In our opinion, this was not the notice contemplated by the statute; and it seems to us that it would make no difference where the owner resided at the time. Where it is sought to make the owner's property liable for the debt of another person, the notice must be given to the owner; and the owner in this case was a corporation, whose principal place of business was not in the county where the agent resided at the time the notice was served, but was in another county of the state. The notice required by the statute not having been given, the court below was right in dismissing the action. Judgment affirmed.

Notice to
owner.

Mechanics' Lien—Sufficiency of Notice.—See note, 24 Am. & Eng. R. Cas. 339; 22 *Id.* 60; 20 *Id.* 505.

TUCHBAND.

v.

CHICAGO & ALTON R. CO.

(New York Court of Appeals, October 8, 1889.)

Foreign Corporation—Property Within State—Service of Process.—Where the plaintiff's affidavits in an action against a foreign corporation alleged generally that the defendant has property within the state, and specifically pointed out office furniture, tickets and other articles in the defendant's office, and cars for transportation, they are sufficient to establish the fact that the defendant has property within the state within the meaning of the provision of the Code of Civil Procedure relative to service of process on foreign corporations.

Same—"Managing Agent"—General Passenger Agent.—A "managing agent" of a corporation within the state, within the meaning of the provision of the New York Code of Civil Procedure relative to service of process on foreign corporations, is a person designated by the company as a general agent although his agency may be confined to one particular department or branch of its business, —*e. g.*, a general passenger agent,—and is not a person who controls the general and practical operation and business of the railroad.

APPEAL from General Term of the Supreme Court, First Department.

L. A. Gould for appellant.

Henry Schmitt for respondent.

DANFORTH, J.—The plaintiff's cause of action arose in the state of Missouri. The defendant is a foreign incorporation, and there has been no designation by it of any person upon whom service of process may be made in the state of New York. One Charles Oberg is described in the defendant's circulars and time-tables, and in its list of "officers and agents," as its "general agent, passenger department, 261 Broadway, New York;" and of himself says he has charge "of the correspondence and business matters relating to carriage of passengers, but has nothing to do with the freight department." The place described as "261 Broadway" is on a street corner. It has windows on Broadway and others on Warren street. They are inscribed "Chicago & Alton Railroad;" "Freight and Passenger Agency, Chicago & Alton Railroad;" "Chicago & Alton Railroad Office." These signs are several times repeated, and plainly

indicate that the office is a general office for the transaction of general railroad business in connection with the defendant's road; the carriage of passengers and freight constituting its entire business. The summons and complaint in this action were served on Oberg. The defendant moved to set aside the service of the summons and complaint "upon the ground that the person to whom the same was delivered was not a person upon whom any service is authorized by statute." The court at special term held the service to have been well made, and upon the proper person: saying "Oberg was a managing agent, within the meaning of that term as used in the Code;" but granted the motion for the reason that "it is not shown that the defendant now has, or at the time of the service had, any property within the state." Upon appeal, the general term reversed the order of the special term, and denied the motion; the learned court considering both questions. 5 N. Y. Supp. 493. It will be seen, therefore, that both courts agree that Oberg was, at the time of service, a managing agent of the corporation; the general term holding, also, that the corporation was shown to have property within the state.

The Code (section 432) provides "that personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof" (1) "to the president, treasurer or secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions under another name." (2) To a person designated for the purpose, in the manner therein prescribed. (3) If there is no such person as those named in the preceding subdivisions within the state, "and the corporation has property within the state, or the cause of action arose therein, to the cashier, or director, or a managing agent of the corporation within the state."

It being conceded that the cause of action did not arise in this state, we are to inquire whether, *first*, the corporation has property within this state. As to that, there are positive averments in the plaintiff's papers, both general and specific,—general, that it has property within the state, and specific, pointing out office furniture, tickets, and other articles in its office, and cars for transportation. *Second*, whether Oberg, within the meaning of the Code, *supra*, was a managing agent. The defendant, like other railroad corporations, necessarily has not only directors, a treasurer, and secretary, but other officers and agents. By these persons, or, under their direction, by others, the business of the company is con-

Statute providing for service of process.

Property within state.

General agent.

ducted. From the very nature of a body corporate, service of process cannot be personal; and at common law it was made by serving it on a proper officer, so it might come to the knowledge of the company, and then proceeding by distress. 1 Tidd, Pr. 121. Under the statute, *supra*, the same object was in view; and where the corporation has an office in this state, where a substantial portion of its business is transacted by a person designated by itself as a general agent, although followed by words indicating some one department, it may safely be assumed that the object of the statute will be accomplished. It, of course, intends a "managing agent" in this state; and, where a corporation created by the laws of any other state does business in this state, the person who, as its agent, does that business, should be considered its managing agent; and more especially should that be so where the foreign corporation has an office or place of business in this state, and when that office is in charge of that person, and he there acts for the corporation. He is there doing business for it, and so manages its business. Such person is, in every sense of the words used in the statute, "a managing agent." Corporations of this description have become very numerous. They carry on an extensive business in this state. They may sue in our courts, and may be required to answer as defendants in the same tribunals; and, if they have notice to do so in the simple and summary manner prescribed by statute, the ends of justice will be attained. It was the duty of Oberg, the person served, to send the papers he received to his principal: and it was his declared intention to do so. It was in fact done, and the defendant appears, not to answer to the suit, but to complain of the insufficiency of service. We think the objection unavailing. The order in this case is not only directly sustained by the case of *Palmer v. Pennsylvania Co.*, 35 Hun (N. Y.), 369, but is within the principle on which *Hiller v. Burlington & M. R. R. Co.*, 70 N. Y. 224, and *Pope v. Terre Haute Car & Mfg. Co.*, 87 N. Y. 137, were decided. So far as the cases cited by the appellant hold a contrary doctrine, they cannot be approved. To limit service by requiring the person served, in case of an action against a railroad corporation, to be one who controls "the general and practical operations and business of running its road," would so restrict the meaning of the statute as to render it useless. Such an agent would naturally find his occupation and engagement in the state where the road was domiciled or operated; and, if his incidental presence in this state subjected him to process as representing the corporation, it cannot be supposed that the legislature intended to confine the remedy to him

alone. The order appealed from should be affirmed, with costs. All concur.

Service of Process—Constitutional Law.—The power of the legislature to authorize suits against a foreign corporation is not confined merely to actions *in rem*. It may also provide for the institution of actions *in personam* without violating any constitution or fundamental principle. *Barnett v. Chicago & L. H. R. Co.*, 6 Thomp. & C. (N. Y.), 359.

The method of service upon a railroad corporation is simply part of the procedure, and a statute which prescribes a mode of service of judicial process different from that provided in the charter of a corporation, is not void because it impairs the obligation of a contract. *Cairo & F. R. Co. v. Hecht*, 95 U. S. 168; *New Albany & S. R. Co v. McNamara*, 11 Ind. 543.

Same—Mandatory and Exclusive Provisions.—In some cases it has been held that the method prescribed by statute for the service of process is exclusive of any other method of service. See *Cosgrove v. Tebo & N. R. Co.*, 54 Mo. 495; *Union Pac. R. Co. v. Pillsbury*, 29 Kan. 652; *North v. Cleveland & M. R. Co.*, 10 Ohio St. 548. And this is especially the case in the case of foreign corporations. See *Hartford Fire Ins. Co. v. Owen*, 30 Mich. 441; *Congar v. Galena & C. U. R. Co.*, 17 Wis. 477. Accordingly, it was held in *American Express Co. v. Conant*, 45 Mich. 642, that where the statute which prescribed the mode of service upon foreign corporations, only authorized service upon some one authorized by power of attorney to receive it, proof of service upon the "agent" of a foreign corporation, was insufficient. Where the statute relative to the condemnation of lands provided that service of notice might be made upon "the president, secretary, or any director or trustee" of the corporation, it was held that the method prescribed was exclusive, and that service "upon any acting ticket or freight agent" under another statute was insufficient. *St. Paul & N. P. R. Co. v. Minnesota, St. C. & W. R. Co.* (Minn.), 28 Am. & Eng. R. Cas. 255. But in *State v. Hannibal & St. J. R. Co.*, 51 Mo. 532, it was held that although a statute provided that in actions for failure to ring a bell or sound a whistle before reaching a crossing, service might be made on a director of the company, the direction of the statute was permissive, and was not mandatory or exclusive, and that service on a station agent of the company was sufficient. And in *Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 Ind. 426, the court held that the provisions of the Indiana Act of 1863, that the summons in actions against railroads for the killing of stock might be served upon a conductor, were not exclusive, and that service might be made upon any agent of the corporation as authorized by the act of 1853.

When by statute it is provided that if the suit be against a corporation, process may be served by delivering a copy of the summons "to the president or other head of the corporation, secretary, cashier, treasurer and director, or managing agent thereof," such statute supersedes the common law method of compelling corporations to appear in court, and the proper mode of bringing into court a railroad corporation charged with a criminal offense, is by service of a copy of the summons upon one of its officers or agents. *State v. Western North Carolina R. Co.* (N. Car.), 22 Am. & Eng. R. Cas. 58; *Railroad Co. v. State*, 32 N. H. 215. But compare *State v. Ohio & M. R. Co.*, 23 Ind. 362.

Same—Implied Repeal of Statute.—A statute which provides that process issued by a justice of the peace may be served upon a corporation by leaving a copy thereof with the president, cashier or secretary, or other principal officer of such company, does not repeal a statute providing for service upon railroad corporations which enacts that service may be made upon any conductor of a freight or passenger train. *Fowler v. Detroit & M. R. Co.*, 7 Mich. 79.

Same—Service upon Officers De Facto.—In *Berrian v. Methodist Soc. in New York*, 4 Abb. Pr. (N. Y.), 424, it was held that the service of process upon the officers of a corporation must be upon the officers *de facto*, or those who were in possession of the offices under a claim of right, and not merely upon certain persons claiming to be officers *de jure*. The possession of the office was deemed to be essential to the validity of the service of process.

Same—Rule of Construction.—It would appear that statutes relative to the service of process on corporations are remedial, and should be liberally construed. *Peoria Ins. Co. v. Warner*, 28 Ill. 429.

Same—When No Statutory Provision Exists.—In the absence of any statutory mode of service of notice upon a corporation, when service can not be had upon the chief officer or managing agent, service upon any officer whose official relation to the governing body or managing or chief clerk, would make it his duty to communicate the notice, is sufficient, and the secretary is such an officer. *Heltzell v. Chicago & A. R. Co. (Mo.)*, 16 Am. & Eng. R. Cas. 619. So too, it has been held that personal service upon the managing agent of a corporation is personal service upon the corporation. *New York & E. R. Co. v. Purdy*, 18 Barb. (N. Y.), 574.

In *State v. Pennsylvania R. Co.*, 42 N. J. L. 490, it was held that *mandamus* directed to a foreign corporation engaged in business in New Jersey might be lawfully served upon any officer of the company in New Jersey upon whom lawful service could have been made, according to the ancient common law, if the corporation were domestic. And in *Glaize v. South Carolina R. Co.*, 1 Strobb. (S. Car.), 70, the court declared that the local residence of a corporation is not confined to the locality of its principal office or place of business, but extends to the territorial limits of the jurisdiction which granted its charter, and such corporation may be made a party to a suit by service of a writ on its president in any district where the plaintiff resides, or the cause of action accrues, and its presence may be enforced, when necessary, by a *distringas* on its property in such district.

Same—Resignation of Office to Prevent Service.—An officer of a corporation is not bound to retain his office for the purpose of enabling process to be served upon him, and a resignation to prevent service is valid. *Ervin v. Oregon Steam Nav. Co.*, 22 Hun (N. Y.), 598. See also *Amy v. City of Watertown (U. S.)*, 24 Am. & Eng. Corp. Cas. 395.

Same—Application of Statutes to Foreign Corporations.—When there are no special provisions relative to the service of process upon foreign corporations, such corporations are within the operation of a general statute providing for service upon corporate agents. *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249; *Midland Pac. R. Co. v. McDermid*, 91 Ill. 170; *Mineral Point R. Co. v. Keep*, 22 Ill. 9; *Chicago, B. & Q. R. Co. v. Manning (Neb.)*, 35 Am. & Eng. R. Cas. 618.

Same—Place Where Cause of Action Arises.—In some instances, the statutes relative to the service of process upon foreign corporations have been construed to authorize service upon an agent of the corporation within the jurisdiction only when the cause of action was transitory and not local. *Hughart v. Bedford & B. R. Co.*, 2 Pearson (Pa.), 116. Thus in *Grover v. American Express Co.*, 11 Fed. Rep. 386, and *Central R. & B. Co. v. Carr (Ala.)*, 23 Am. & Eng. R. Cas. 487, it was held that the statutes authorizing the service of process upon foreign corporations, did not apply to causes of action which arose outside of the respective states. In some instances, the statute only authorizes service upon domestic corporations when the cause of action arises within the jurisdiction. See *Lung Chung v. Northern Pac. R. Co. (C. C.)*, 16 Am. & Eng. R. Cas. 548.

Same—Federal Courts—When Corporations Are "Found" Within District.—It has been held, that where foreign corporations engage in business in a

state whose law provides that they may be summoned by process served upon an agent in charge of its business, they are "found" in the district in which such agent is doing business within the meaning of the Act of Congress relative to the jurisdiction of the federal courts. See *Block v. Atchison, T. & S. F. R. Co.*, 21 Fed. Rep. 529; *McCoy v. Cincinnati, I., St. L. & C. R. Co.*, 13 Fed. Rep. 3; *Brownell v. Troy & B. R. Co.*, 3 Fed. Rep. 761.

Same—President and Vice-President.—Service of process upon the president of a corporation is a sufficient service. *Galveston & R. R. Co. v. Shepherd*, 21 Tex. 274. See also *Branham v. Fort Wayne & S. R. Co.*, 7 Ind. 524. And in *Atlanta & P. Tele. Co. v. Baltimore & O. R. Co.*, 46 N. Y. Super. Ct. 377, it was held that personal service on the president of a foreign corporation in New York city was sufficient to give jurisdiction without an attachment of its property, and that it was not necessary in such case that the corporation should have property in the state, or that the cause of action should have arisen therein.

The vice-president and general superintendent of a railroad company are "agents" of the corporation within the meaning and intent of a statute providing for service upon the agents of corporations, whether domestic or foreign. *Norfolk & W. R. Co. v. Cottrell (Va.)*, 31 Am. & Eng. R. Cas. 235.

Same—Directors.—In *Curtis v. Avon, G. & Mt. M. R. Co.*, 49 Barb. (N. Y.), 148, it was held that the service of summons on a director of a corporation, was a sufficient compliance with the statute to give the court jurisdiction. See also *Com. v. Wilmington & R. R. Co.*, 2 Pearson (Pa.), 408. If notice is given to a director officially, for the purpose of being communicated to the board, the corporation is bound by it although such notice should not be communicated. *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195. And when the statute provides that notice may be served "upon the secretary, or other officer or agent" of a corporation, service of notice upon a director of the company is sufficient. *Scioto Val. R. Co. v. McCoy*, 42 Ohio St. 251. But a director is not a "head or managing agent" within the meaning of a statute. *Alabama & T. R. R. Co. v. Burns*, 43 Ala. 169.

Same—Alternative Provisions.—Where a statute provides that service may be made upon a corporation by leaving a copy of the summons with the president, secretary or other specified officer if he can be found within the county, and if not, then by leaving a copy of the summons with any director, clerk, or other agent of the company found in the county, there are two distinct classes of persons specified upon whom service may be made, and service upon the first class is primary to service upon the other. Jurisdiction will not be obtained by service upon the second class except it affirmatively appears that service could not be had upon the persons specified in the first class. *St. Louis, V. & T. H. R. Co. v. Dawson*, 3 Ill. App. 118. See also *Cairo & F. R. Co. v. Rea*, 32 Ark. 29; *Cairo & F. R. Co. v. Trout*, 32 Ark. 17; *Cairo & V. R. Co. v. Joiner*, 72 Ill. 520; *St. Louis, A. & T. H. R. Co. v. Dorsey*, 47 Ill. 288; *Hoen v. Atlantic & P. R. Co.*, 64 Mo. 561.

Same—Service upon Managing and Other Agents.—By statute it is often provided that service of process may be made upon a "managing agent" within the jurisdiction. In Ohio it would appear that a foreign corporation cannot be made the defendant in any action in *personam* except it has a managing agent within the state. See *Barney v. New Albany & S. R. Co.*, 1 Handy (Ohio), 571.

In *Brewster v. Michigan Cent. R. Co.*, 5 How. Pr. (N. Y.), 183, it was held, that to authorize legal service of a summons upon a foreign corporation where the service is made upon its "managing agent," the managing agent must be one whose agency extends to all the transactions of the corporation—one who has and is engaged in the management of the corporation as distinguished from the management of a particular branch or department of its business. And in *Lake Shore & M. S. R. Co. v. Hunt*,

iff had no knowledge of any conditions; that the defendant company had not taken any reasonable means to bring notice to her of the existence of the conditions; and that the circumstances surrounding the purchase of the ticket, and the entry into the agreement, were such that she might reasonably have supposed that the contract was without conditions.

These findings bring the case within the exceptions to the rule that a person is bound by the terms of a contract into which he enters whether he chooses to read the contract or not; and disposes, I think of the first objection.

As to the second, the jury have found that the accident was caused by faulty construction, thus negating the idea of its being attributable to any superior force not under the control or within the intervention of man. In order to constitute such a defense there must be two things: first, an act which occurred without the intervention of man, and, second, a result such as could not, by the exercise of reasonable care, skill and ability, have been avoided by the parties charged with the loss.

As to the third question, that is, limitation, the cases of *Kelly v. Ottawa Street R. Co.*, 3 A. R. 616, and *May v. Ontario and Quebec R. Co.*, 10 O. R. 70, 26 Am. & Eng. R. Cas. 337 were relied upon as overruling the previous authority of *Roberts v. Great Western R. Co.*, 13 U. C. R. 615. I have looked at the cases, and have come to the conclusion that the *Roberts Case* is a direct authority in favor of the plaintiff. That was an action brought by a passenger who was injured by a train running off the track. The next case of *Auger v. Ontario, Simcoe and Huron R. Co.*, 9 C. P. 164, which is one of the cases relied upon or followed in *Kelly v. Ottawa Street R. Co.*, was a case of injury to horses on the track. There the court held that the limitation clause did apply; but the *Roberts Case* was not cited, nor disapproved of in any way, and apparently was not thought by either counsel or court to be applicable to the facts in the *Auger case*. *Browne v. Brockville and Ottawa R. Co.*, 20 U. C. R. 202, decided about the same time, in which judgment was given by ROBINSON, C. J., was a case of collision at a crossing. In that case the *Roberts Case* was not cited or referred to in the judgment, which cannot be taken as in any way shaking its authority.

The case of *McCallum v. Grand Trunk R. Co.*, 30 U. C. R. 122, subsequently in the Court of Appeal, 31 U. C. R. 527, was a case of fire from the track. In the first report of that case the *Roberts case* is not cited or referred to; in the second report—in the Court of Appeal—it is cited in the argu-

Knowledge of
conditions of
ticket.

Act of God.

Limitation of
action.

ment, but not referred to in the judgment; but HAGARTY, J., in giving judgment, says the facts of the McCallum Case may easily distinguish it from a case of liability under a contract; thus recognizing the authority of the Roberts Case.

In *Kelly v. Ottawa Street R. Co.*, the injury was caused by a man jumping into a ditch to avoid collision with a car driven in a negligent manner. There the case is cited, but is not overruled. It is referred to approvingly by Mr. Justice BURTON: and he says that the principle of the case might well have been followed in like cases. That decision is rested—not upon principle, because the principle is objected to and dissented from by both the learned Judges who delivered judgment, except Mr Justice PATTERSON, who probably approved of it—but upon the authority of the two previous cases of *Auger v. Ontario, Simcoe, and Huron R. Co.*, and *McCallum v. Grand Trunk R. Co.* But it in no way shakes the authority of the first case.

From some expressions found in *May v. Ontario and Quebec R. Co.*, it would seem to be an authority in the defendants' favor, the learned Chief Justice, now Sir Adam Wilson, on p. 77, making use of the following language: "In that sense any damage done upon the railway by negligence in the carriage of passengers and the like, would be damage done 'by reason of the railway,' or, as Sir John Robinson put it, 'damage done by reason of the railway.'" It however, refers to the Roberts Case, without referring to the principle, and also to *Prendergast v. Grand Trunk R. Co.*, 25 U. C. R. 193, in which the clause was held not to apply. It in no sense questions the authority of these decisions; and, if it did, would not be authority which I could follow in the face of the previous authorities. I must therefore find that Roberts v. Great Western R. Co., is still the authority on that point.

Judgment must therefore be for the plaintiff on the question of limitation also.

The defendants gave notice of motion to the Divisional Court to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants on the grounds set out in the judgment of GALT, C. J.

G. T. Blackstock for the motion.

McCarthy, Q. C. and *Wallace Nesbitt contra.*

GALT, C. J.—In my opinion, there were no special conditions on the ticket purchased by the plaintiff. The ticket was produced, and several conditions are printed on it, and, among others, one limiting the liability of the company for loss of baggage to \$100. Immediately below these conditions there is this agreement: "In consideration of the reduced rate at which this ticket is sold,

Effect of special condition in ticket.

I hereby agree to all the provisions of the above contract." [Signature.]

This was not signed by the plaintiff; and it was proved that the ticket was not sold at a reduced rate. There was, therefore, no agreement on the part of the plaintiff to any of the above conditions. There was a question raised as to the evidence of the ticket not having been sold at a reduced rate; but, on the face of the ticket itself, there is, among the conditions, a stipulation which proves that it was not so sold. "4. If this contract and its coupons are cancelled with an L punch, it indicates that this ticket was sold at a reduced rate." The ticket is not cancelled. It is therefore plain that the ticket was not subject to the conditions.

On the argument before us, Mr. Blackstock urged that it was possible the subsidence of the track, which caused the accident, might have occurred from some convulsion of nature (of which there was no evidence), therefore the defendants were discharged. I think it safer to act on finding of the jury, who had ample testimony before them as to the manner in which the embankment had been constructed, and as to the action of water thereon.

As to the last and really important defence, viz., the lapse of time, no question was submitted to the jury, as it was not disputed the action was not commenced within the six months. The learned Judge reserved judgment, and subsequently gave a considered judgment in favor of the plaintiff, holding that the plaintiff was not precluded by that delay.

At the last Hilary Sittings, the defendants moved for judgment in their favor, or for a new trial, on the following grounds: 1. "That the said findings and the verdict of the jury are contrary to the evidence and weight of evidence." In my judgment there was ample evidence to sustain the findings. 2. "That the learned Judge at the trial improperly admitted as evidence against the defendants certain letters written by one W. R. Callaway to other of the defendants' servants." This is the circumstance to which I have already alluded in referring to the sale of the ticket to the plaintiff.

Admissibility of letters.

The letters in question were produced by the defendants. The first was written by Mr. Anderson, general baggage agent, to Mr. Callaway, the passenger agent, desiring to know whether the plaintiff's attention "was called to the conditions under which this ticket was sold to her, and why not signed by her;" and the second, in reply, from Mr. Callaway, stating "the rules of the company do not require unlimited first class tickets signed. This ticket was sold at full tariff rate." In my opinion this evidence was clearly admissible. This was a question put by an officer of the defend-

ants in charge of the department "of baggage," to another officer by whom the ticket in question was sold, relating to the sale of the ticket, and appears to me to be clearly within the decision of the Court of Queen's Bench, in the case of *Kirkstall Brewery Co. v. Furness R. Co.*, L. R. 9 Q. B. 468. It certainly is singular that the defendants, when in possession of this correspondence, should have thought it expedient to raise such a defence; moreover, it is a matter of no consequence, as, on the face of the ticket itself, it is subject to no conditions.

The third ground is, "That plaintiff is not entitled to recover more than \$100, by reason of the conditions indorsed upon the ticket." I have disposed of this ground, as I do not think there were any conditions limiting the liability.

4. "That the accident out of which the plaintiff's cause of action arose was caused by the act of God, or by some other extraordinary or unforeseen cause, for which the defendants are not liable in law to the plaintiff." I have already commented on this ground.

5. "That the defendants are not liable to the plaintiff for the negligence in the construction of the railway, as found by the jury, at the place in question."

On the argument, this objection was mentioned, but was not argued, as it was impossible for the learned counsel to contend that, after the defendants had been in possession of the railway for a considerable time as their own property, they could be heard to say in a case like the present brought against them as common carriers, they were not liable because the original construction of the railway was defective.

6. "That the plaintiff is precluded, by the six months' limitation clause in the Railway Act, from bringing this action against the defendants." This is really the only question in dispute between the parties. My brother ROSE has carefully considered it in his judgment, and it was very fully and ably argued by Mr. Blackstock, for the defendants, and Mr. McCarthy, Q. C., and Mr. Nesbitt, for the plaintiff.

Limitation of
action.

The ticket was purchased by the plaintiff in October, 1886, and the accident occurred a few days afterwards. The writ of summons was issued on 15th September, 1887. The clause in the Railway Act R. S. C., chap. 109, under which this question arises, is sec. 27, under the heading, "Actions for indemnity; fines and penalties and procedure therefor." Sec. 27. "All actions or suits for indemnity for any damage or injury sustained by reason of the railway" (that is to say, the railway and the works authorized by the special act to be so constructed), "shall be commenced within six months next after

the time when such supposed damage is sustained, or if there is continuation of damage, within six months after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue and give this act and the special act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by the authority of this act, and the special act." Secs. 28 and 29, which are the other sections under the same heading, refer to the enforcement of penalties to which persons violating the provisions of the act are liable.

The first case in which a railway company sought to avail themselves of this limitation is *Roberts v. Great Western R. Co.*, 13 U. C. R. 615, which was an action brought by a passenger for damages by reason of the car being thrown off the track, owing to the alleged negligence of the company. The court were unanimously of the opinion that the tenth section of the act incorporating the company (which is similar to sec. 27) does not apply to an action of that nature, but only to actions for damages occasioned by the company in the execution of the powers given, or assumed by them to be given, for enabling them to maintain their railway. It was upon the authority of this case my brother ROSE based his judgment.

The next case is *Auger v. Ontario, Simcoe and Huron R. Co.*, 9 C. P. 164, which was an action brought to recover damages for the loss of the plaintiff's horses, which were killed by a locomotive. The court held in that case the limitation did apply; but, in giving judgment, RICHARDS, J., says: "There is no doubt the courts have held repeatedly that the limitation clauses do not apply where the companies are carrying on the business of common carriers, "even in those cases where they are permitted by their act of incorporation to use locomotives, etc., for the conveyance of passengers and goods, etc., and to charge for such conveyance; but the liability arises in those cases from the breach of contract arising from their implied undertaking to carry safely, and to take proper care of the goods." This case, therefore, so far as the reasoning of the learned judge in giving the unanimous decision of the court, is in favor of the plaintiff.

The next case is *Browne v. Brockville and Ottawa R. Co.*, 20 U. C. R. 202, which was for an injury sustained by plaintiff by collision at a crossing, owing, as was alleged, to the neglect of defendants to give signals, and to construct crossings at a proper level. ROBINSON, C. J., by whom the judgment was given, and before whom the case had been tried, held, at p. 207, that "as to the cause of damage arising from the improper or imperfect construction of the crossing, that

does certainly come expressly within the words in our statute." Mr. Blackstock contended that, as the cause of action in the present case arose from the defective construction of the railway, this case was a direct authority in his favor. In my opinion it is not so, for this reason: In the present case the defendants had entered into a contract with the plaintiff to carry her baggage safely as common carriers, and it was their duty to see that the railway was in a proper state. In the case cited the defendants were under no obligation to the plaintiff, apart from the public generally; and the clause in question has reference only to such an obligation, not to any special contract.

The case of *Kelly v. Ottawa Street R. Co.*, 3 A. R. 616, was also cited by Mr. Blackstock; but that has no bearing on the present contention, for, unquestionably, the injury complained of was one sustained by the manner in which the railway was managed.

The last case referred to on behalf of the defendants was *May v. Ontario and Quebec R. Co.*, which was before WILSON, C. J., on demurrer, 10 O. R. 70, 26 Am & Eng. R. Cas. 337. The learned Chief Justice gave judgment on the demurrer in favor of the defendants; but it was more a matter of form, for he finally stated that the statement of claim was insufficient, and then, on the authority of *McCallum v. Grand Trunk R. Co.*, and *Kelly v. Ottawa Street R. Co.*, decided the demurrer.

I may mention that *McCallum v. Grand Trunk R. Co.*, 30 U. C. R. 122, 31 U. C. R. 527, was one for injury caused by fire from the locomotive of the defendants, and was held by the court of appeal to come within the provisions of the statute. There was no question of contract. Mr. Nesbitt cited several cases bearing on this question, but there were none of them which had reference to any contract.

I agree with my brother ROSE, that the principle stated in *Roberts v. Great Western R. Co.*, has not been questioned in any of the other cases, but, on the contrary, is affirmed by the reasoning of the learned Judge in *Auger v. Ontario, Simcoe, and Huron R. Co.*; and this motion must be discharged with costs.

ROSE and MACMAHON, J.J., concurred.

Baggage—Conditions in Ticket Limiting Liability.—See *Dixon v. Richelieu Nav. Co. (Ont.)*, 39 Am. & Eng. R. Cas. 425; *Bate v. Canadian Pac. R. Co. (Ont.)*, 37 *Id.* 208; *Kansas City, St. J. & C. B. R. Co. v. Rudebaugh (Kan.)*, 34 *Id.* 219; *Mauritz v. New York, L. E. & W. R. Co. (C. C.)*, 21 *Id.* 286, note 292; *Baltimore & O. R. Co. v. Campbell (Ohio)*, 3 *Id.* 246.

STAUB

v.

KENDRICK.

(Indiana Supreme Court, December 12, 1889.)

Personal Baggage—Salesman's Illustrated Catalogue.—A travelling salesman's illustrated catalogue, prepared by himself at his own expense, and his individual property, which he carries with him for his personal use and convenience to enable him to properly discharge the duties of his business, is personal baggage, for which he may recover from a person who undertakes to transfer it from one depot to another, and through whose negligence it is lost.

APPEAL from Circuit Court, Vigo County.

Action by John L. Kendrick against Charles P. Staub to recover damages for the loss of a valise and its contents. Defendant appeals from a judgment for the plaintiff.

L. D. Leveque, T. A. Foley and T. W. Harper for appellant.
H. J. Huston and Harry Dunham for appellee.

OLDS, J.—This is an action by the appellee against the appellant, for the value of a valise and contents and damages resulting from the loss of the same. The appellant was engaged in the transportation of trunks and baggage,

Facts.

in the city of Terre Haute, to and from the various hotels and railway stations, and, in conducting such business, he had men and teams employed. The appellee is a travelling salesman for the firm of Howell, Gano & Co., wholesale hardware dealers, at Cincinnati, Ohio. The appellant arrived at the Union depot, in the city of Terre Haute, on the train due there at 5:30 P. M., on the afternoon of September 26, 1883. Immediately on his arrival, he engaged one of the employes of the appellant to convey his two trunks and a valise to the Indianapolis & St. Louis depot, in said city, and paid him the price asked for transferring the same, and the baggage-man, the employe of the appellant, took possession of the trunks and valise, and delivered to the appellee three checks for the trunks and valise. The appellee took supper at the Union depot, and walked to the Indianapolis & St. Louis depot, to take a train leaving at 6:50 P. M., same day, for Paris, Ill.

On his arrival at the Indianapolis & St. Louis depot he was informed by the person to whom he had delivered the goods that he could not find the valise. The valise was lost; and this suit is brought for the value of it, and of its contents. The plaintiff not only seeks to recover for the value of the valise and its contents, but also for his loss of time and expense. There was a trial had, resulting in a finding and judgment for the appellee for \$85.10. The court made a special finding of facts, and stated its conclusions of law thereon. The appellant excepted to the conclusions of law; also, moved for a new trial, which was overruled, and to which ruling exceptions were reserved by the appellant, and error assigned both as to the conclusions of law stated and the ruling on the motion for a new trial.

The facts found by the court, in brief, are as follows: That on the afternoon of the 26th day of September, 1883, at 5:30 o'clock, P. M., the plaintiff arrived at the Union depot in the city of Terre Haute, from the town of Clinton, Ind. Immediately after arriving he contracted with one Rogers, then in the employ of the defendant and employed in driving a baggage wagon for the defendant, to transfer from the Union depot to the Indianapolis & St. Louis depot two travelling salesman's trunks and one valise, for the transfer of which plaintiff paid Rogers 50 cents; and Rogers gave the plaintiff three checks,—one for each trunk and one for the valise,—the check for the valise bearing the inscription "Buss check 10, I. & St. L. Depot." That Rogers took the two trunks and valise from the Union depot to the Terre Haute House, when he unloaded the trunks on the sidewalk, and put the valise on top of the trunks, and went away, and left the trunks and valise, with no person in charge of them, until he returned to take them to the Indianapolis & St. Louis depot, just before the time for the arrival of the 6:50 P. M. train. That plaintiff, after eating his supper at the Union depot, walked to the Indianapolis & St. Louis depot, to take the 6:50 P. M. train west. Arriving at the Indianapolis & St. Louis depot a few moments before train-time, he presented his three checks to Rogers for the trunks and valise, and was informed by Rogers that he could not find the valise. Plaintiff was going to Paris, Ill., and was told by defendant to go on that train, and he would send the valise to him. Plaintiff went to Paris, Ill., as directed, and on the following morning received word by telephone that the valise was lost, and asking him to return to Terre Haute. That plaintiff came to Terre Haute, as requested, paying his railroad fare, amounting to 60 cents, and remained at Terre Haute three days, endeavoring to recover his valise, stopping at the National House,—paying \$2.50 per

day. That the valise was lost without any fault of plaintiff, and through and by the negligence of defendant's agent. That the valise contained property consisting of necessary wearing apparel, brushes, and necessary articles for use in travel, to the amount of \$21.50; also, a travelling salesman's illustrated catalogue, of the value of \$50. That plaintiff was in the employ of Messrs. Howell, Gano & Co., hardware merchants of Cincinnati, Ohio, as a travelling salesman. That said catalogue was prepared by himself, at his own expense, and was his individual property; and that it was necessary for his convenience and use as such travelling salesman. That the defendant had caused notices to be posted up in his stable, and in the waiting-rooms of the depots, that he would not convey valises, and be responsible for the same, and had instructed his agents not to receive valises; but plaintiff had no knowledge of such instructions or notices. On the foregoing facts, there is stated what purports to be conclusions of law, mingled with which are additional findings of fact, finally terminating with the conclusion that plaintiff should recover the sum of \$85.10; and judgment is rendered for that amount. The motion for new trial is on the grounds that the finding of the court is contrary to the evidence, and not supported thereby.

The findings of fact do not support the conclusion of law that the plaintiff is entitled to recover the amount stated. The defendant is liable, under the facts found, for the value of the contents of the valise; and the evidence supports the finding, even if the grounds stated in the motion are such as can be construed to question the sufficiency of the evidence to support the finding, which, it may be said, is very doubtful. There is no finding as to the value of the valise; and the value of the goods found amount, in the total, to the sum of \$71.50.

It is contended that the defendant is not liable for the value of the catalogue, but we think differently. It is a book used by him in the business in which he was engaged. **Liability for catalogue.** He carried it with him, for his personal use and convenience; and it is found to be a necessary article for him to carry, to properly discharge the duties of the business in which he was engaged, and the object for which he was travelling. The case of *Gleason v. Goodrich Transportation Co.*, 32 Wis. 85, is a case directly in point; and it was held that the transfer company was liable for the value of a book of this same character. In that case, the court, after quoting and citing other authorities, say: "It must, on the whole, be held, we think, that the book in question was an article of personal baggage, within the definition above given,

and the decisions upon the subject. It was a thing of personal use and convenience to the plaintiff, according to the wants of the particular class of travellers to which he belonged, and was taken with him as well with reference to the immediate necessities of his journey as to the ultimate purposes of it. It was not an article of merchandise, or the like, or anything designed for use ulterior to the purposes of his journey, but a book of memoranda, convenient and necessary for him, personally, in accomplishing the object of his travel. It was personal baggage, within the definition and rule of law upon that subject." See, also, *Doyle v. Kiser*, 6 Ind. 242; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262. No doubt, the court reached the conclusion that the plaintiff was entitled to recover the amount stated on the theory that the plaintiff was entitled to recover for all the incidental damages arising from the loss, such as railroad fare, time, and hotel expenses. This we do not deem it necessary to pass upon, as no such facts are found as would entitle the plaintiff to recover any definite sum therefor. There is no finding as to the value of plaintiff's time, nor as to the time necessarily occupied in looking after the valise, nor as to his necessary expenses while so engaged. Clearly, under the findings of fact, the plaintiff was only entitled to recover \$71.50, and the court erred in its conclusion of law that the plaintiff was entitled to recover \$85.10; and the conclusion of law should have been that the plaintiff is entitled to recover \$71.50. In case the appellee remits the amount of the judgment in excess of \$71.50 within 20 days from this date, the judgment will be affirmed, at his costs. Otherwise, the judgment will be reversed, at his costs, with instructions to the court below to restate its conclusions of law, and render judgment in favor of appellee in accordance with this opinion.

What is Baggage.—See *Blumenthal v. Maine C. R. Co. (Me.)*, 34 Am. & Eng. R. Cas. 247, note 249.

CENTRAL TRUST CO. OF NEW YORK

v.

WABASH, ST. LOUIS & PACIFIC R. CO. *et al.*(PERRY *et al.*, Intervenor.)

(U. S. Circuit Court, N. D., Illinois, July 23, 1889.)

Baggage—Jeweller's Trunk—Knowledge of Contents—Liability.—If a station agent checks, as personal baggage, a trunk known to him to belong to a jeweller and to contain a stock of jewelry, the railroad company is liable as a common carrier for its loss to the same extent as if the trunk had contained nothing but wearing apparel, or as if it had undertaken to carry it as freight.

IN EQUITY. On intervening petition by Perry Brothers.
R. S. Tuthill and *F. C. Hale* for intervenors.
G. B. Burnett for receivers.

GRESHAM, J.—The intervenors, Perry Bros., are jobbers of jewelry and watches at Chicago. One of the firm, Arthur J. Perry, was at Springfield, Ill., with a trunk containing a stock of jewelry and watches, and, desiring to go to Petersburg in the same state, bought a ticket for passage over one of the lines of the Wabash Railway, then in possession of Humphreys and Tutt, as receivers. The station agent, who had served as such at the same place for more than 11 years, checked the trunk, which weighed 250 pounds, to Petersburg as ordinary personal baggage, charging 25 cents for overweight, 150 pounds being the amount allowed to a passenger. The nature and contents of the trunk were not expressly disclosed to the agent, and he made no inquiries upon that subject. The trunk was three feet by two and a half, iron-bound, weighed 250 pounds, and was known in the trade and to baggagemen as a jeweler's or commercial traveler's trunk. The evidence shows that the intervenors and other merchants of the same class, then and prior thereto sold their goods, in the main, directly from trunks transported from place to place over railroads, and that this road had, previously and frequently, checked and carried such trunks for the intervenors and others as personal baggage, but that the receivers no longer permitted such carriage. The train was wrecked before it reached Petersburg, and

the trunk and its contents were destroyed by fire. The accident was caused by a defective roadbed and rotten ties. The master to whom the case was referred reported that the trunk and its contents—watches and jewelry—were worth \$8,227.42, for which amount he recommended an allowance, less \$612, the value of the goods rescued from the wreck.

If the station agent did not know that the trunk contained jewelry, he had reason to believe it did. He received it knowing that Perry was not entitled to have it carried as personal baggage. The agent did not believe the trunk contained wearing apparel only. It is plain from the evidence that he recognized it as a jeweler's trunk, and that he understood it contained a stock of jewelry. He was not, therefore, deceived and the receivers were not defrauded. Having checked the trunk by their agent as personal baggage, knowing, or having reason to believe, that it contained jewelry, the receivers became bound to safely transport it to its destination, which they did not do, and they are liable for the damages that resulted from a breach of the contract. They sustained to the trunk and its contents the relation of a carrier, and they are liable for the property destroyed by their negligence, just as if the trunk had contained nothing but wearing apparel, or as if they had undertaken to carry it as freight. The exceptions to the master's verbose report are overruled, and a decree will be entered in favor of the intervenors for the amount found due them.

Commercial Traveler's Trunks and Sample Cases as Baggage—Liability of Carrier.—See *Dixon v. Richelieu Nav. Co.* (Ont.), 39 Am. & Eng. R. Cas. 425, note 439; *Blumenthal v. Maine C. R. Co.* (Me.), 34 *Id.* 247, notes 249, 254.

PULLMAN PALACE CAR CO.

v.

LOWE.

(*Nebraska Supreme Court, December 17, 1889.*)

Sleeping Car Companies—Liability—Wearing Apparel of Passenger.—A sleeping-car company, so far as it renders service similar in kind to an innkeeper, is subject to the same liabilities; and where an article of wearing

apparel belonging to a passenger in one of such cars has been placed in the care of the porter, and is stolen from the car, the company will be liable therefor.

The words "guest" and "lodger" defined.

ERROR from District Court, Douglas County.

Howard B. Smith for plaintiff.

A. Steere, Jr., for defendant.

MAXWELL, J.—This action was brought by the defendant in error against the plaintiff in error to recover the value of an overcoat which it is alleged was lost or stolen from a Pullman car in which the defendant in error was a passenger, on the Wabash Railway, from St. Louis to Council Bluffs. The court was requested to make special findings in the case, which it did, as follows: "I find, as the facts proven on the trial of this case, that on the 18th day of April, 1887, the plaintiff took passage at St. Louis for Council Bluffs on the Wabash & St. Louis Railroad, and purchased a sleeping-car ticket from the defendant's agency at St. Louis, entitling him to a lower berth in the sleeping-car attached to the train which left St. Louis the evening of that day. That the train left St. Louis at 8:25 P. M. That a short time before the train left plaintiff entered the sleeping-car, and, upon doing so, delivered his coat to the porter of the car, who took it, and placed it in the vacant upper berth of the section of which plaintiff had secured the lower berth. That, shortly after the train started, the sleeping-car conductor passed through the car, and took up the ticket which had been purchased by the plaintiff and gave him in exchange therefor another ticket, known as a 'berth-ticket,' which was in turn taken up by the porter soon afterwards, when he prepared the sleeping berth for occupation by the plaintiff. That the next morning, when the plaintiff arose, he took out from the upper berth a portion of his clothing, and then saw his overcoat there, where it had been placed the evening before by the porter, and where he (the plaintiff) left it. That plaintiff was last to leave his berth, and, with the exception of a gentleman and lady, the last of the passengers to leave the car for breakfast that morning. That plaintiff went out to breakfast at the regular breakfast station, which occupied him about 15 minutes, and that after breakfast he stood on the rear platform of the sleeper about ten minutes smoking a cigar, and then went to his berth in the car, the same having been made up, and then discovered that his overcoat was missing. That he immediately called the attention of the conductor of the sleeping-car to the fact, who, after first disclaiming any responsibility for the care of

Special Findings.

the coat, after a time caused a search to be made through the car, in company with the porter, for it, but without finding it, and the coat has been entirely lost to the plaintiff, and was of the value at the time of the loss of \$50. I also find that the conductor left the car at the breakfast station, and went to his breakfast at the same time as the passengers, including the plaintiff, were at their breakfast, and that during the interval of about 25 minutes' absence of plaintiff from his berth in sleeping-car, between the time when he left the car for breakfast and the time when he returned into it, his berth was made up, and his overcoat abstracted. Conclusion of Law: I find, as a conclusion of law, that defendant was guilty of negligence in not properly guarding and taking care of property of plaintiff during his necessary absence from defendant's car, and that plaintiff was not guilty of negligence in the matter. I therefore find that defendant is liable to the plaintiff for the value of the overcoat, to-wit, \$50, with interest thereon from April 20, 1887, to the first day of this term, \$3.75." The rules of the company were also introduced in evidence in its behalf, but, as the defendant in error had no notice of them, they do not enter into the case.

Conclusion of law.

The question presented, therefore, is the liability of a sleeping-car company for the loss of necessary wearing apparel of one who had paid the necessary sleeping-car charges, and was lawfully riding in one of its cars, which apparel had been placed in the care of the employes of the company. We find no case exactly in point, and as the question is a new one, not only in this state, but, to a great extent, in the other states of the nation, we are practically without precedents to aid us, and must adopt such rule as may seem just and equitable. It may be well to consider what the company undertakes to perform, and also what it does not undertake. The latter proposition will be considered first. It does not undertake to furnish the railway for its cars to run upon, nor the motive power to propel them, and hence is not entitled to compensation for the ordinary carriage of passengers. It does invite for hire all passengers holding first-class tickets to occupy its cars. In effect, it says to all such passengers: "We will furnish you safe, pleasant, commodious cars, with all possible facilities to prevent weariness and fatigue, with comfortable sleeping accommodations, and the necessary toilet facilities, if you pay the price demanded in addition to the ordinary fare." The nature of this undertaking is the question for consideration. On the one hand, it is claimed that, so far as the company holds itself out as performing the duties of an innkeeper,

Contract of sleeping-car company.

so far it should be charged with the strict liability of the same. On the other, it is sought to make the liability of the company merely that of a lodging-house keeper. In the very able and carefully prepared briefs of the attorney for the plaintiff in error, we find the following objections to charging the company with the liability of an innkeeper. He says: "It undertakes (1) to furnish accommodations to 'first-class passengers exclusively; (2) to furnish toilet accommodations to such passengers; (3) to furnish a certain specified seat or bed to such a passenger; (4) to furnish a servant who will respond to all proper demands on his service by such passengers, promptly and politely; but to do these four things for a limited time, which is agreed upon between it and each passenger in advance. It does not make even this agreement with all those who travel by rail. It makes this agreement with first-class passengers exclusively.

The distinction between an inn-keeper and a lodging-house keeper is set forth in many cases, but is very well drawn in the case of *Cromwell v. Stephens*, 2 Daly (N. Y.), 15, (1867,) from pages 21 to 26, inclusive. After quoting the definition of an "inn," as given by Chief Justice OAKLEY in *Wintermute v. Clark*, 5 Sandf. (N. Y.), 247, to-wit, "where all who come are received as guests, without any previous agreement as to the duration of their stay or as to the terms of their entertainment;" and from *Willard v. Reinhardt*, 2 E. D. Smith, (N. Y.) 148, in which the distinctions between a boarding-house and an inn were declared to be this: "In a boarding-house, the guest is under an express contract, at a certain rate, for a certain period of time, but in an inn there is no express engagement; the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract;" and from *Carpenter v. Taylor*, 1 Hilt. (N. Y.), 195, as follows: "Mere eating-houses cannot be considered as inns. They are wanting in some of the requisites necessary to constitute them inns,"—it will be seen that a distinction is attempted to be drawn between the sleeping-car company and an inn-keeper, because only a certain class can occupy such cars, viz., persons holding first-class tickets, whereas, at an inn, all who conduct themselves properly may be entertained. There is great confusion in the decisions as to what constitutes an "inn." In *Calye's Case*, 8 Coke, 32, it was held that inns were instituted for passengers and wayfaring men. In another case, an "inn" is defined to be a house where the traveler is furnished all he has occasion for while on the way. *Thompson v. Lacy*, 3 Barn. & Ald., 283. *Bouvier* defines "innkeeper" to be "the keeper of a common inn

Distinction
between inn-
keeper and
lodging-house
keeper.

for the lodgment and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation." The innkeeper is bound to take in and receive all travelers and wayfaring persons, and entertain them, if he can accommodate them, and the same is true of a sleeping-car company as to all passengers holding a first-class ticket. The fact that persons holding second or third class tickets agree, in effect, in consideration of lower fare, to waive their right to enter a sleeping-car, does not enter into the case any more than that of a traveler who, to avoid the expense of an inn, should stop at a private house. In any event, the company which sells sleeping-car tickets to all first-class passengers that may pay the price, to that extent stands in the same relation as an innkeeper who must for hire entertain those asking for entertainment.

A more difficult question is to properly define the word "guest" at an hotel. Parsons defines a "guest" to be one who "comes without any bargain for time, remains without one, and may go when he pleases." 2 "Guests." Pars. Cont. 151. This is not sufficiently comprehensive to be a proper definition. In *Walling v. Potter*, 35 Conn. 183, the supreme court of Connecticut defines the word "guest" as follows: "A guest is one who patronizes an inn as such. But it is said that none but a traveler can be a guest at an inn, in a legal sense. We do not suppose that the court intended, in the definition above quoted, to lay stress upon the word 'traveler.' It is used in a broad sense, to designate those who patronize inns. In *Wintermute v. Clark*, 5 Sandf. (N. Y.), 247, the court say that, in order to charge a party as an innkeeper, it is not necessary to prove that it was only for the reception of travelers that his house was kept open; it being sufficient to prove that all who came were received as guests, without any previous agreement as to the time or terms of their stay. A public house of entertainment, for all who choose to visit it, is the definition of an inn. These definitions are really in harmony with each other. Webster defines a traveler as 'one who travels in any way.' Distance is not material. A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, any one away from home, receiving accommodations at an inn as a traveler,

is a guest, and entitled to hold the innkeeper responsible as such." This, we think, is a correct definition of the word "guest," and we adopt the same. *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.), 417. In the latter case, the guest made an arrangement as to the price to be paid per week, and it was held that this did not take away his character as a traveler and guest. See, also, *Hall v. Pike*, 100 Mass. 495; *Norcross v. Norcross*, 53 Me. 163; *Pinkerton v. Woodward*, 33 Cal. 557; and a valuable article in 14 Cent. Law J. 206; *Hancock v. Rand*, 17 Hun (N. Y.), 279. In *Dunbler v. Day*, 12 Neb. 597, this court held that an innkeeper was bound to take all possible care for the safety and security of the goods, money, etc., of his guests while in his house. And if the goods or money of a guest be stolen from the inn, through no fault or neglect of the guest, nor by a companion guest, and there is no evidence to show how it was done, or by whom, the innkeeper is liable for the loss. This, we think, is a correct statement of the law.

A "lodger" is defined by Bouvier to be "one who inhabits a portion of a house of which another has the general possession and custody." There is some confusion in the "Lodgers." decisions arising mainly from the want of a clear definition of what constitutes a "guest" as distinguished from a mere "lodger." Generally, however, a lodger is one who, for the time being has his home at his lodging-place. *Phillips v. Evans*, 64 Mo. 17. The rule, under the decisions, is not of universal application, but nearly so. *Phillips v. Henson*, 30 Moak, Eng. R. 19, *Thompson v. Ward*, L. R., 6 C. P. 327; *Bradley v. Baylis*, L. R., 8 Q. B. Div. 195; *Ness v. Stephenson*, L. R., 9 Q. B. Div. 245; *Hickman v. Thomas*, 16 Ala. 666; *Ullman v. State*, 1 Tex. App. 220.

It will be seen that the engagement of the sleeping-car company, so far as it goes, is exactly the same as the duties assumed by an innkeeper. A passenger, on entering a sleeping-car as a guest,—because that is what he is in fact,—necessarily must take his ordinary wearing apparel with him, and some articles for convenience, comfort, or necessity. The articles, when placed in the care of the company's employes, are *infra hospitum*, and are at the company's risk. The liability of innkeepers is imposed from considerations of public policy, as a means of protecting travelers against the negligence and dishonest practices of the innkeeper and his servants. Occasionally, no doubt, the innkeeper is subjected to losses without any fault on his part. This, however, is one of the burdens pertaining to the business, and the courts have deemed it necessary to enforce this wholesome rigor to insure the security of

Liability of
sleeping-car
company.

travelers. Besides, where loss is sustained, neither party being in fault, it must be borne by one of them, and it is no more unjust to place it on the innkeeper than on the guest. The liabilities incident to the business are to be considered in fixing the charges for the service. *Mason v. Thompson*, 9 Pick. (Mass.), 283. Except in the matter of furnishing meals, there seems to be no essential difference between the accommodation at an inn and those on a sleeping-car, except that the latter are necessarily on a smaller scale than at an inn. In both cases the porter meets the traveler at the door, and takes whatever portable articles he may have with him. He waits upon him and the other passengers in the car so long as they remain therein. The traveler is not required to sit in his seat during the day, but may, if he so desires, go forward into the other cars on the train, and at stations may go out on the platform. A passenger in a sleeping-car need not avail himself of these privileges, but the fact that he may do so, and that many persons actually do avail themselves of the same, is well known to every traveler and to the company, and is a circumstance in the case. If it is said that it would be unjust to hold the company to the same liability as an innkeeper, because thieves might take one or more berths in a car, and at the first opportunity leave the car, carrying what articles they could steal before leaving, the same is true of an innkeeper. Thieves, in the garb of respectable people, may take rooms at an inn, and afterwards steal what they can, and escape, yet no one would contend that the innkeeper would not be responsible for the property so stolen, and this, whether it is stolen at night or in the day-time; yet in many of the large inns of this country, at least, there are numerous doors for ingress and egress, while in a sleeping-car there are but two. Were meals served on a sleeping-car, no one would contend that it differed from an inn in its accommodations. In this state meals are furnished on the through trains and a passenger need not leave the train from the time of entering it until he reaches the end of the line. This, however, does not appear to have been the case on the railway in question. But the fact that meals are taken at designated stations on the line of the road, instead of on the train itself, does not change the character of the service rendered. So far as such services are rendered, they are the same in kind as those furnished by an innkeeper; and the security of travelers, and as a means of protecting them, not only against the negligence, but also against the dishonest practices, of the agents or employes of the sleeping-car company, requires that the company, so far as it renders service as an innkeeper, shall be subject to like liabilities and obligations. The judgment is therefore affirmed. The other judges concur.

Liability of Sleeping Car Companies for Loss of Passenger's Effects.—Notwithstanding the statement of MAXWELL, J., in the principal case that the question is a new one not only in Nebraska, but to a great extent in the other states, the question has been raised many times, and a contrary view to that adopted by the Nebraska supreme court has uniformly been taken. It has uniformly been held that the liability of the sleeping car company where it is sued for the loss of a passenger's baggage, is not that of an inn-keeper or that of a carrier of freight, but that it is liable only for negligence. See *Pullman Palace Car Co. v. Pollock* (Tex.), 34 Am. & Eng. R. Cas. 217; *Hillis v. Chicago, R. I. & P. R. Co.* (Iowa), 31 *Id.* 108; *Lewis v. New York Sleeping Car Co.* (Mass.), 28 *Id.* 148; *Dargan v. Pullman Palace Car Co.* (Tex.), 26 *Id.* 149; *Stearn v. Pullman Palace Car Co.* (Ont.), 21 *Id.* 443, note 447; *Pullman Palace Car Co. v. Gardner* (Pa.), 16 *Id.* 324; *Woodruff S. & P. Coach Co. v. Diehl* (Ind.), 9 *Id.* 294.

Same—Sufficiency of Evidence.—In an action against a palace car company, it appeared that plaintiff was a passenger in one of defendant's sleeping cars; that he was told he would require to change cars on account of a wreck, that having partially dressed himself, he left his pocketbook containing a sum of money lying upon the bedding of his berth and went to the wash room, whence, having finished dressing, he went out of the car and forward to the wrecked train some 60 or 70 yards distant. Immediately on arriving there he missed his pocketbook and went back to recover it. He found the conductor and porter in the smoking room and informed them of his loss. All the other passengers had left the car before plaintiff, and they did not return to it until after he did. He testified that he was not absent from the car more than three or four minutes, and that when he left it no one remained in it except the conductor and porter. It appeared in evidence that a train brakeman had passed through the car but without stopping. The conductor, porter and passengers were searched, but the pocketbook was not found. *Held*, that a verdict for the plaintiff was sufficiently sustained by the evidence, and that it would not be reversed on appeal. *Pullman Palace Car v. Matthews*, Tex. Sup. Ct., Nov. 1, 1889. HENRY, J., who delivered the opinion of the court, said:—"In the case of *Pullman's Palace Car Co. v. Pollock*, 69 Tex. 120, 34 Am. & Eng. R. Cas. 217, the following language of the supreme court of Massachusetts, used in deciding the case of *Lewis v. New York Sleeping Car Co.*, 28 Am. & Eng. R. Cas. 150, is quoted with approbation: 'While it [the sleeping-car company] is not liable as a common carrier or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor.' We think this doctrine is as applicable to the case now before us as it was in the cases in which it was asserted. The evidence suggests either that the plaintiff did not lose any money or that the servants of the defendant, or one of them, found and appropriated it. The district court found the issue in favor of the plaintiff, and the judgment is sufficiently sustained by the evidence to make it our duty to affirm it, following the rule always enforced in such cases. The position in which plaintiff left his money was unquestionably an act of negligence on his part; and, if the evidence did not so conclusively exclude the idea of its having been taken by anybody except the servants of defendant, who were in charge of the car, he ought not to have had a recovery, because of his own negligence. The fact, however, that plaintiff's negligence furnished the temptation and opportunity to defendant's servants to take the money did not release it from its obligation to protect him against them."

WELLS

v.

ALABAMA GREAT SOUTHERN R. CO.

(Mississippi Supreme Court, November 11, 1889.)

Passengers—Obligation to Stop Train—Place other than Station.—In the absence of a special contract, a railroad company is not bound to stop its trains at any point other than a station, even though a passenger have embarked by mistake on a train which passes such point, and, by mistake, has paid fare thereon.

Same—Special Contract—Sufficiency of Evidence.—By the rules of a railroad company, a fare of 25 cents was charged for any distance not exceeding eight miles. Plaintiff applied to the ticket agent at M. for a ticket to R., which was refused because R. was not a stopping place. She then entered the train and informed the conductor that she wished to go to R. The conductor collected from plaintiff the fare, 25 cents, and informed her that the train did not stop at R., and that she could leave the train at W. W. and R. were both within eight miles of M. *Held*, that the evidence was insufficient to establish any special contract to carry plaintiff to R.

Same—Declarations of Ticket Agent—Admissibility.—If the complaint in an action for failure to carry a passenger to her destination, contains no averment relative to the declarations made to her by the ticket agent to the effect that the passenger might board the train without a ticket and pay her fare on the car, evidence of such declarations is inadmissible.

Same—Declarations of Station Policeman—Competency.—In an action for damages for failure to carry a passenger to her destination, the declarations of the station policeman to the effect that plaintiff might board the train and that the conductor would put her off at the place to which she was going, are inadmissible, the policeman having no authority to make contracts for transportation.

APPEAL from Circuit Court, Lauderdale County.

Action by Mary Wells against the Alabama Great Southern R. Co., to recover damages for failure to carry her from Meridian, Miss., to Russell's Station. It appeared from the evidence that the train which plaintiff boarded did not stop at Russell's Station; that Russell's was not a flag station, nor a stopping place, and had not been for several years; that there was no side track there, and that no train was scheduled to stop there, and that it would have been a violation of the company's rules for any conductor to stop there. The conductor told plaintiff to leave the train at Wallace's Station. The plaintiff was compelled to walk from Wallace's to Rus-

sell's, carrying a box and baby, and sustained injuries for which she sought to recover damages. The court instructed the jury to return a verdict for the plaintiff and defendant appeals.

Witherspoon & Witherspoon for appellant.
Fewell & Brahan for appellee.

WOODS, C. J.—While it is true that railroad companies engaged in carrying passengers for hire are under legal obligation to receive and carry upon their trains persons desiring to be transported, who properly deport themselves and pay the required fare, yet it is equally true that such companies are permitted to establish their own depots or stations, and to arrange their own schedules for the safe and proper movement and management of their trains. In the absence of a special contract, no passenger can be heard to complain in court that the carrier has refused to stop any train at any point other than one of its stations, even if such passenger shall have mistakenly embarked thereon, and shall have paid the passenger money. For to allow the caprice, or the wish, or even the seeming necessity, of an individual to procure stoppages of trains at unaccustomed points, and to disarrange the schedule fixed for their predetermined and regular movement, would be to permit not only vast property interests, but human lives as well, to be certainly and recklessly put in peril. The appellant cannot maintain her cause in this proceeding if she was denied the privilege of disembarking at a point on defendant's line of railway other than a station and where trains were not accustomed to stop, but was put off, in a civil manner, at the stopping place nearest her destination, (she having expressed no wish to be carried to any other station more remote,) unless she can show affirmatively a special contract with the defendant to transport her to the desired, but unaccustomed, point.

The evidence in the case before us demonstrates with certainty that Russell's, the point to which appellant desired to be carried, was not a station, or accustomed stopping place, and that it had not been for several years before the injury complained of occurred. There seems to us no room for controversy on this point in the case. It is apparent that, if any train had for a great while prior to the date of the alleged injury stopped at Russell's, such stopping was unauthorized, and was in violation of the rules of the railroad company.

It is strongly insisted by counsel for appellant that, even

Refusal to
stop train at
point other
than station.

Evidence
shows that
plaintiff's des-
tination was
not a station.

conceding the correctness of our conclusion just announced, the appellant is entitled to a recovery by virtue of a special contract made by defendant to transport her to an unaccustomed stopping place. It is urged that the acceptance of a sum, which would have been the regular fare to Russell's, by the conductor of the train, after knowledge that appellant took the train, desiring to go to that point, and after her request to be put off at that point, was in itself tantamount to a special contract with defendant to comply with her wish. It is to be said, in reply to this, that the fare so collected by the conductor was the proper fare for a passage to any point not exceeding eight miles from Meridian, the place where appellant embarked. It was the proper fare for a passage to Wallace's also, and, as already stated, to any point not exceeding eight miles from Meridian. The sum collected by the conductor was 25 cents, and that was the prescribed rate for any distance not exceeding eight miles. If the conductor was to collect any fare from appellant, (and his duty required him to collect the fixed rate,) he was bound to collect just what he did; unless indeed, appellant had expressed a desire to be carried to some other station more remote from her destination, and of this there is no intimation whatever in the record. Moreover, the conductor is not, ordinarily, the agent of defendant with persons contracting for transportation. He was not the agent to whom appellant made application first for transportation on the occasion we are looking at. The defendant's ticket agent is, ordinarily and properly, the person who is authorized to make such special contracts, and to whom prudent travelers make application. And this is exactly what appellant did. Before embarking she applied to the ticket agent to purchase a ticket for Russell's, and was refused. Not content with one refusal, application was made the second time, and was again refused. Surely these facts afford no support to the theory of a special contract. On the contrary, they afford convincing proof that there was no such contract, and, further, that appellant, as a reasonable being, was thereby warned that the taking of the train for Russell's would be at her own peril.

No special contract established.

It is contended by counsel, however, that the court below erred in this connection in declining to permit appellant to state to the jury certain declarations made to her by the ticket agent, to the effect that appellant might board the train without a ticket, and pay her fare on the car. It is sufficient to say that the pleadings on which defendant took issue contained no averment of such declarations. In the absence of any averment of these declarations, and in the absence of any notice to de-

Declarations of ticket agent—Admissibility.

defendant to prepare to meet that issue, this offer to introduce evidence of such declarations was, we think, rightly denied by the court. Besides, if the declarations of the ticket agent were thought by counsel to be relevant and important, appellant might then have asked leave to amend her complaint in this particular, in order to meet the objection. But no amendment was sought to be made.

The offer of appellant to introduce evidence of statements made by defendant's policeman in Meridian, at the time of appellant's taking the train, was also properly refused by the court. So far as the record shows anything on the question of the policeman's powers and duties, it appears that he was a mere policeman engaged in the simple duty of assisting persons on and off defendant's trains, and in preserving order about the depot. It was beyond the scope of his powers to make contracts for transportation which at all bound his principal, even if he had assumed to do so. We are of the opinion that no error was committed in excluding the policeman's statements from the jury.

The peremptory instruction to the jury was proper, on all the evidence, and the judgment of the court below is affirmed.

Right of Passenger to Require Train to Stop at Place not a Regular Station.—See *International & G. N. R. Co. v. Hassell* (Tex.), 21 Am. & Eng. R. Cas. 315; *Platt v. Chicago & N. W. R. Co.* (Wis.), 21 *Id.* 319; *Trottinger v. East Tennessee, V. & G. R. Co.* (Tenn.), 13 *Id.* 49; *Lake Shore & M. S. R. Co. v. Pierce* (Mich.), 3 *Id.* 340.

Carrying Passenger Beyond Station—Evidence.—In an action against the defendant, as receiver of the Vicksburg & Meridian R. Co., to recover damages for being carried past her station, the plaintiff testified that she was sick, and did not know the station, and so informed the conductor who promised to let her know when the station was reached. The conductor denied that he had any such conversation with plaintiff. He did not, however, let her know when the station was reached, and she did not hear it called. Her attorney was on the same train, and testified that he got off at the station in question, but did not hear it called, he being familiar with the locality and not paying particular attention. It was the duty of the colored porter to call the name of the station, and he testified that he did so, on the occasion in question, and that he was sure, because his attention was called to the matter the next day. There was evidence that plaintiff was what is called a "morphine eater" and occasionally involuntarily lost consciousness. *Held*, that the evidence was not sufficient to maintain plaintiff's action. *Tillery v. Bond*, 38 Fed. Rep. 825.

Passenger not Allowed by Gate-keeper at Station to Reach Train—Mistake as to Rules.—The plaintiff, Carr, brought suit against the Baltimore & Ohio R. Co. for damages for the refusal of the gate-keeper at its depot in the city of Washington, to allow the plaintiff to pass through the gate to reach the train he desired to take. *Held*, that the mistake of the gate-keeper as to his duties under the rules of the depot was no defense, the passenger having the right to pass through the gate at the time he made the attempt. *Baltimore & Ohio R. Co. v. Carr*, Md. Ct. App., June 11, 1889.

PICKENS

v.

RICHMOND & DANVILLE R. Co. *et al.**(North Carolina Supreme Court, December 16, 1889.)*

Ejection of Passenger—Non-payment of Fare—Right of Passenger to Re-enter Train.—After the conductor of a train has stopped it to eject a passenger for nonpayment of his fare, he is not bound to accept fare then tendered by the passenger and may again eject him if he re-enters the train.

THIS was a civil action tried before CONNOR, J., and a jury, at the February term of the superior court of Henderson county.

The plaintiff, in his complaint, which is a part of the record, set out two causes of action, to both of which the defendants, in their answer, made appropriate defenses. The defendants admitted that they are duly incorporated, and subject to be sued in the courts of this state; that they are common carriers. The following issues were, without exception, drawn and submitted to the jury: "First Cause of Action. (1) Did the defendant, on the 26th day of November, 1887, sell the plaintiff the ticket as set forth in allegation 5 of the complaint? Answer. Yes. (2) Did the defendant, by its agents and servants, on the 19th day of January, 1888, unlawfully, and in violation of the terms of such ticket, refuse to carry plaintiff on its cars, and violently and wrongfully eject him therefrom as alleged? A. No. (3) What damage did plaintiff sustain thereby? A. ———. Second Cause of Action. (1) Did the defendant, on the 19th day of January, 1888, unlawfully and wrongfully refuse to carry plaintiff on its cars from the station at Campton, on its road, to Hendersonville, on said road, and unlawfully eject the plaintiff from its cars, as alleged? Answer. Yes. (8) What damage did the plaintiff sustain thereby? A. One thousand dollars, (\$1,000.)"

S. V. Pickens was introduced in his own behalf, and, after being sworn, testified: "I am the plaintiff. On the 26th day of November, 1887, I purchased of the defendant's agent, in the office of the Richmond & Danville Railroad Company, at Hendersonville, N. C., a ticket from Hendersonville, N. C.,

ing off, and the plaintiff walking along by the side of the car, he said: 'I will pay you the fare all of the way.' Mr. Lowrie said: 'You had better let him get on.' He did so. Plaintiff paid his fare on the platform. I am positive that he did not offer to pay the whole fare until after he had been put off on the ground the second time, and the train had moved. I must have heard it if he had. I was touching the conductor. When plaintiff came back in the car he said: 'This is worth thirty thousand dollars to me.'" Mr. Page sworn, and testified: 'I was baggage-master on the train. I was called by the conductor to assist him to put the plaintiff off. I used no more force than was necessary. He never said that he would pay his fare from Spartanburg until the train moved off. I am sure of this. I had hold of his arm."

The defendants put in evidence the deposition of a passenger, to corroborate the testimony of the conductor.

"Deposition of Walter Nichols. Commonwealth of Massachusetts, county of Essex—ss.: Pursuant to the annexed commission, directing the undersigned commissioner to take the deposition of Walter Nichols, to be read in evidence in a suit now pending in the superior court for the county of Henderson, in the state of North Carolina, wherein S. V. Pickens is plaintiff, and the Richmond & Danville Railroad Company and the Asheville & Spartanburg Railroad Company are defendants, at my office, No. 83 Merrimac street, in Haverhill, in said county of Essex and commonwealth of Massachusetts, on the 28th day of September, 1888, the defendants being represented by Ira A. Abbott, Esquire, and the plaintiff having filed cross-interrogatories to be propounded to the deponent by the commissioner, which cross-interrogatories are hereto annexed, I proceeded to examine the said deponent, Walter Nichols, who, being by me first duly sworn, deposes as follows: Direct Examination. 'Question 1. Give your name, residence, and business? Answer. Walter Nichols. I reside in Haverhill, Massachusetts, and am a shoe dealer. Q. 2. In January, 1888, or about that time, were you a passenger on a train running from Spartanburg, in South Carolina, to Hendersonville, in North Carolina, on which S. V. Pickens was also a passenger? A. I was. Q. 3. Were you in the same car with him? A. I was. Q. 4. Did you hear any controversy or conversation between him and the conductor on the train relative to the payment of his fare? A. I did. Q. 5. State what was said by each in your hearing? A. Pickens offered the conductor a ticket, and the conductor refused it, saying it was not stamped properly, and the conditions were not complied with, or words to that effect, and called upon Pickens to pay his fare in money, saying that he had

no right to take his ticket. I think the conductor said he would do what he could to have the money refunded. Pickens refused to pay, and the conductor told him he would have to put him off if he didn't pay. Q. 6. What was then done and said by each in your presence? A. Pickens still refused to pay; and the conductor stopped the train, and laid his hands on Pickens to carry out his purpose. Pickens held back a little, and told the conductor to push a little harder, but made no forcible resistance. He just made a point to hold back, and then walked out with the conductor. I am not sure that the conductor kept hold of him all the time. Pickens was very good-natured, and laughed about it while it was going on. Q. 7. What next happened between them? A. Pickens immediately got aboard of the train and said, "Now I will pay my fare." I think he said that. He and the conductor had further conversation. I understood that Pickens only wanted to pay from the place where he had been put off to Hendersonville, while the conductor wanted him to pay the fare between Spartanburg and Hendersonville. After some little controversy, the conductor stopped the train again, and pushed him a little. There was no particular resistance. Pickens just held back enough to require a little pushing. Pickens wasn't handled roughly. In that way the conductor got him off the train. They then started up the train, and Pickens called out: "I'll pay;" and I think he said, "I'll pay all you ask." Then the conductor stopped the train, and Pickens got on, and rode through to Hendersonville. Q. 8. What, if anything, did you hear Pickens say, after he got on the train the second time? A. He said that he had another case against the railroad company, or that he had two cases against the railroad company. His claim was that he had two cases against the railroad company for putting him off. I saw him go to several passengers, and heard him say, in substance, that he wanted them as witnesses. Those to whom he spoke appeared to be residents of that neighborhood. Q. 9. What was the number of passengers in the car? A. I didn't think there were more than ten or fifteen. Q. 10. Was there any general conversation between Pickens and the other passengers after he got on the train the second time; and, if so, what was its nature and substance? A. There was laughing and joking about the case, and an expression of views as to whether Mr. Pickens could get damages for being put off the train. Q. 11. What was the conduct of the conductor in the matter you have testified of? Quiet and gentlemanly, or the reverse? A. Very quiet and gentlemanly. Q. 12. Did he do any more than was necessary to remove Pickens from the train? A. I shouldn't say he did. I should say he

did not. Q. 13. Did Pickens receive any injury that you perceived, or did he complain of any? A I did not notice any injury. He complained of no injury in particular, to my knowledge. WALTER NICHOLS.' [Countersigned] FRANCIS H. PEARL, Commissioner."

"Cross-Examination. 'Question 1. What is your age and residence? Answer. I am forty-eight years of age, and reside in Haverhill, Massachusetts. Q. 2. What is your height and weight? A. My weight is about one hundred and seventy-five pounds, and my height about five feet and eight inches. Q. 3. What is the color of your eyes and hair? A. My eyes are rather blue, and my hair dark, sprinkled with gray. Q. 4. Did you, or not, have beard or whiskers on your face on the 28th of January, 1888? A. I had no beard and no whiskers, except a mustache. Q. 5. Did you, or not, see and know the plaintiff on or about the 28th of January, 1888? A. I did see him and know him about the 19th or 20th of January, 1888. Q. 6. If so, about what was plaintiff's age, weight, height, and color of hair and eyes? A. I should say from five feet and eight inches to five feet and ten inches in height. I should think that he might be from fifty-five to sixty-five years of age; that he would weigh one hundred and fifty pounds. I do not remember the color of his hair and eyes. Q. 7. What was your business in January, 1888? A. Selling shoes. Q. 8. When at Spartanburg, South Carolina, in January, 1888, where had you been, and where going, and what for? A. I had been to Atlanta and other places in Georgia and South Carolina, and was going to Asheville, in North Carolina, selling shoes. Q. 9. Did you witness the ejection of the plaintiff from the cars at Campton, S. C., about 28th of January, 1888? A. I saw the plaintiff removed from the cars, as I have stated on direct examination, about the 19th or 20th of January, 1888. I do not remember if I ever knew the name of the place. Q. 10. Did you see all that was done, and hear all that was said, by and between the plaintiff and conductor at Campton at time of ejection? A. I think I saw the most of what was done, and heard nearly all that was said. Q. 11. If so, what was said or done by each? A. I have answered this question as fully as I can on direct examination. Q. 12. On which coach, and in what part of it, were you at the time of ejection? A. I was on the same coach with Mr. Pickens, and I think it was the only passenger coach on the train at that time. I think I was near the middle of the coach when the conversation first commenced. Q. 13. How many others were present, and who were they? A. I should judge, from ten to fifteen persons. I didn't know the names of any of them at the time, except Mr. Pickens. I afterwards learned

the names of two others, but cannot recall them now. Q. 14. Was there an animated discussion on the train relative to the justification of the railroad in the ejection of plaintiff during the transit to Hendersonville? A. There was. Q. 15. How many engaged in the discussion? What part did you take, and on what side? A. Nearly all the passengers engaged in the discussion. I took part in it. I took the side of the conductor, and thought he was justified in doing what he did. Q. 16. Why did the conductor stop the train after the second ejection, and after the train had moved off, and take the plaintiff on? A. I suppose he stopped the train because the passengers asked him to, and because Pickens offered to pay all that the conductor required. Q. 17. Have you any interest of any sort in the Asheville & Spartanburg, the Richmond & Danville, the West Terminus, or any other railroad company? If so, what interest and what companies? A. I have no interest of any sort in any railroad company. Q. 18. Do you belong to any church? If so, to what church? A. I do not belong to any church. Q. 19. What is your belief relative to a future and eternal state of rewards and punishment? A. I believe we are rewarded for the deeds done in the body. Q. 20. Of what country are you a native, and of what descent? A. The United States, and of English descent. WALTER NICHOLS.' [Countersigned] FRANCIS H. PEARL, Commissioner."

"Commonwealth of Massachusetts, county of Essex—ss.: I, Francis H. Pearl, the commissioner named in said commission, do hereby certify that the evidence of the witness, Walter Nichols, was taken down under oath, and subscribed by him in my presence, on the 28th day of September, A. D. 1888, at my office, No. 83 Merrimac street, in the city of Haverhill, county of Essex, and commonwealth of Massachusetts, and that I have personal knowledge of said witness; and I further certify that neither of the parties were present at the taking of said deposition, but that the defendants were represented by Ira A. Abbott, Esquire, who propounded questions to the witness on direct examination on behalf of the defendants, and that the plaintiff filed cross-interrogatories hereto annexed, to be propounded to the witness by me on cross-examination, and which I so propounded on the part of the plaintiff. Witness my hand and seal this 28th day of September, 1888. FRANCIS H. PEARL, Commissioner. [Seal.]"

The defendants close.

The plaintiff introduced J. A. Frady, who testified: "I was on the cars the day the plaintiff was ejected. After the conductor put him off, the plaintiff got on the platform, and said that he claimed to be a new passenger from that point. The

conductor said that he would have to pay his way from Spartanburg. They put him off again. He had two hard dollars in his hand. While he was on the second step of the platform he said that he had been in a wreck, and wanted to get home; that he would pay his whole fare from Spartanburg. They put him on the ground. Some one said to the conductor, touching him on the shoulder: 'I think you have gone that far wrong. I would let him get on.' He stopped the train, and plaintiff got on. The conductor said: 'He has been monkeying along here, and, damn him, I will not let him ride on the train.' This was just before he was touched on the shoulder." W. E. Mills was sworn, and testified: "I saw the plaintiff put off. They put him off. He got on again. They put him off the second time. He said that he had been in a wreck, and wanted to go home. I saw him tender the money. I said to the conductor: 'Why don't you let him on? He has offered to pay you.' He said plaintiff had 'been monkeying around there, a damn fool,' and he had a great mind not to let him get on again. I was looking out of the window on the side, at the end." J. S. Johnson sworn, and testified: "The plaintiff offered to pay full fare before he was put off the second time." There was testimony that the characters of J. S. Johnson, W. E. Mills, and J. A. Frady were good.

The plaintiff's counsel request the court to instruct the jury, in regard to the first cause of action: "The contract upon the ticket, requiring it to be stamped and countersigned at Jacksonville, Florida, is a simple contract, and may be waived by the authorized agent of defendants; and if upon the return trip the conductor accepted the ticket as offered by the plaintiff, without having been countersigned and stamped by the agent at Jacksonville, as one of its conditions required, and without such stamping and signing had passed plaintiff upon it from Jacksonville to Columbia, S. C., as testified by plaintiff; and if at Columbia he took a coach which came through to Hendersonville, and the conductors, the agents of the Richmond & Danville Railroad Company, accepted said ticket, and passed plaintiff upon it to Spartanburg, and left the ticket with plaintiff, with the punch-marks on it, to be taken up by the conductor from Spartanburg to Hendersonville, these acts in law constitute a waiver of the right to enforce the requirement to have it stamped and signed, and the conductor from Spartanburg had no right to refuse to pass plaintiff the remainder of the trip upon it, and his expulsion from the train was unlawful." First Exception. The court refused to give the instruction, and plaintiff excepted. The plaintiff's counsel requested the court to charge the jury, upon the second cause of action: "The plaintiff being in fact the

real purchaser of the ticket, and having used it, unstamped and not countersigned at Jacksonville, from that point to Spartanburg, by the sanction and consent of the conductors, and without any objection made by any of them, and being the *bona fide* owner, presenting it to the conductor after leaving Spartanburg, offering at the same time to identify himself, if required, the plaintiff was not a trespasser upon defendants' cars, and if he tendered the fare from Campton to Hendersonville, at the former place and before the train had started, he was entitled to ride, and his expulsion was unlawful. Second Exception. The court declined to give the instruction, and the plaintiff excepted. The defendants' counsel requested the court to instruct the jury: "If the plaintiff refused to exhibit a lawful ticket, or to pay full fare for the whole distance ridden by him from Spartanburg, when demanded by the conductor, he had a right to put him off the train; and when he was put off at a flag-station, at which point the train had stopped for that purpose alone, plaintiff could not claim the right to get back on the train and continue his journey by agreeing to pay the fare which he previously refused to pay. When plaintiff refused to pay full fare, and the conductor was in the act of ejecting him, he could not, by offer to pay, acquire the right to again become a passenger on the same train." The court declined to give either of said instructions, and defendants excepted. The court then instructed the jury: "The plaintiff was bound by the contract on the face of the ticket, and by the terms of such contract he could not demand passage upon the ticket on his return from Jacksonville until it had been signed by him and stamped by the agent at Jacksonville; that the conductor was under no obligation to accept the ticket without such stamp, and, upon refusal to pay his fare, was justified in expelling him from the car. The plaintiff says that he used no more force than was necessary to do so. The fact that plaintiff had used the ticket from Jacksonville, Fla., to Spartanburg, S. C., without having complied with the terms of the contract on his ticket, did not in law, operate as a waiver by the defendants of the conditions thereof. The second issue should therefore be answered in the negative. The first is, by consent, answered in the affirmative. This disposes of the plaintiff's first cause of action, and it is unnecessary for you to consider the third issue." The plaintiff excepted. "In regard to the plaintiff's second cause of action, the plaintiff being in the car without a ticket which the conductor, under his instructions, could accept, and having, as he admits, refused to pay his fare, and being rightfully expelled, he could not lawfully demand passage to Hendersonville without paying his fare from Spartanburg,—that

being the point from which the conductor was in charge of the train,—and his offer to pay fare from Campton to Hendersonville did not entitle him to remain on the cars. The conductor was therefore justified in again expelling him, he having gone upon the platform. In doing so, he could not lawfully use more force than was necessary. In regard to the second phase of testimony bearing upon this alleged cause of action, there is some conflict among the witnesses, and it will be your duty to reconcile such conflict so far as you can, and to arrive at the truth. In doing so, discard from your minds entirely the fact that plaintiff is a citizen of your county, and the defendants are corporations. The counsel on both sides of this controversy have, with great propriety, warned you against considerations of this character. You are to be guided by the testimony as you hear it, and nothing else, in arriving at the truth in regard to the facts. You are to apply to such facts, as you may find them, the rule of law as I shall give it to you, and thereby arrive at your verdict. The plaintiff insists that by the testimony it is shown that, while he was still on the platform of the car, and the defendants' servants were in the act of expelling him, having the money in his hand, the train standing, and not in motion, he offered to pay his fare from Spartanburg to Hendersonville; that the conductor refused to accept such offer, and ejected him the second time: that the station was one at which tickets were sold, and passengers taken on and allowed to leave the train. The defendants, on the contrary, insist that the testimony shows that at the time the plaintiff made the offer to pay the full fare he had been ejected, and was on the ground; that the cars were in motion; that Campton was and is a flag station; and that the train was stopped for the sole purpose of ejecting plaintiff; and that he had no right to re-enter the train. You will remember the testimony of the plaintiff, the conductor, and the other witnesses who testified in regard to the transaction. It is your duty also to consider the argument of counsel which has been made, and endeavor to obtain therefrom assistance in reaching a correct conclusion. The plaintiff requests me, and I charge you, if you find that while the train was standing at Campton, and before it had moved, the plaintiff at any time tendered or offered to pay the fare from Spartanburg to Hendersonville, the conductor should have received it, and permitted the plaintiff to continue his journey; and his refusal to do so was wrongful, and his expulsion, if you find that he was expelled after making such tender, was unlawful; and your answer to this issue should be in the affirmative. But, if you find from the testimony that the plaintiff did not make such tender until after the train had

started, and was in motion, the conductor was under no obligation to stop the train and receive him into the car, and you should answer the issue in the negative. If you find the issue in the affirmative, you should, in answer to the next issue, award to the plaintiff such damages as will compensate him for the injury which he sustained by such expulsion. In doing so, you should include such actual damage as he sustained from exposure, cold, the treatment received, mortification, and humiliation of feelings. The damages should be confined to such as were sustained by his eviction after the tender of his fare from Spartanburg. In addition thereto, you may, if you find that there was any violent, profane, or insulting language used and applied to the plaintiff, or any wanton or unnecessary indignity offered to plaintiff, if in the exercise of your sound judgment you deem proper, give him such vindictive or exemplary damages as you think just and right, under the circumstances." In response to a prayer by defendants' counsel, the court further instructed the jury: "But, in the absence of evidence of insult, violence, or wanton injury, the plaintiff cannot recover more than actual damages." The defendants excepted to the refusal to charge as requested, and to the charges given.

There was a verdict for the plaintiff, as set forth in the record. The defendants made a motion for a new trial, for error in refusal to instruct the jury as requested, and in the instructions given. Motion denied. The defendants then moved the court to set aside the verdict because the damages assessed were excessive. Motion denied. Judgment. The defendants appealed.

F. H. Busbee and D. Schenck for appellants.

Batchelor & Devereux for appellee.

AVERY, J.—The plaintiff's first cause of action was founded on the failure and refusal of the defendant companies to perform the contract arising out of the purchase by plaintiff at Hendersonville, N. C., of a return ticket from that place to Jacksonville, Fla., and the ejection of plaintiff from the car of the Spartanburg & Asheville Railroad Company on his return, at a place called "Campton," on their road, because he had failed to sign said ticket, and have it stamped by the agent at Jacksonville, according to the contract printed in it. The second cause of action was the alleged wrongful expulsion of the plaintiff, and the refusal by the agent of the defendants, after he had been ejected from the train, and while he was being expelled, to accept the tenders of money made by him for fare. We cannot consider the reasonableness of the regulation in reference to

signing and stamping the plaintiff's ticket; for, in the discussion of this appeal, that cannot now be treated as an open question. The judge below instructed the jury as to the nature of the contract, and the alleged waiver of it by the railroad companies; and the jury found the issue arising out of that cause of action for the defendants. The plaintiff did not appeal, and the defendants assign as error only the refusal of the court to give the instruction asked, and the giving of that substituted for it, upon the issues involved in the second cause of action.

Following the general current of authority in the United States, this court has held that the officers of a railroad company have a right to expel a passenger who refuses to pay the usual fare, provided no more force is used than is necessary in ejecting him.

Expulsion for non-payment of fare.

Clark v. Wilmington & W. R. Co., 91 N. C. 512, 18 Am. & Eng. R. Cas. 366; Skillman v. Cincinnati, S. & C. R. Co., 13 Am. & Eng. R. Cas. 31; Toledo, W. & W. R. Co. v. Wright, 34 Am. Rep. 277; Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277, 3 Am. & Eng. R. Cas. 340; Butler v. Manchester, S. & L. R. Co., 33 Am. & Eng. R. Cas. 556, and note; Petrie v. Pennsylvania R. Co., 42 N. J. Law, 449, 1 Am. & Eng. R. Cas. 258. In Clark v. Wilmington & W. R. Co., *supra*, the court say further in reference to the expulsion of a passenger who has refused to pay: "Nor, when the officer has stopped the train, and he is descending the steps, and about to pass out, will a tender of the fare entitle him to return to his seat. He forfeits his right of carriage by such misconduct by breaking his own contract to pay when called on; and it is not regained by his repentance at the last moment, and after he has caused the inconvenience and delay to the company by his wrongful act." If the tender of fare is made by a passenger, or any other person for him, before the train is stopped to expel him, the company must accept it and allow him to remain; but after the train has been stopped for that purpose, he cannot reimpose upon the company the obligation to perform a contract which he had violated in the first instance by an offer of the money that he ought to have paid when demanded. Hoffbauer v. Davenport & N. W. R. Co., 52 Iowa, 342.

If persons were allowed, out of mere wantonness or mischief, or in order to test a legal question, to decline to pay fare until a train is stopped to eject them, and then, at the moment of expulsion or immediately after, to reinstate themselves in all their original rights as passengers by a tender of the usual fare, it would often subject the public to inconvenience, travelers

Right to re-enter on tender of fare.

to dangers of accident, and corporations to useless risks, simply to gratify caprice or malice, or a propensity for speculation. It is a well-settled principle, in which nearly all of the authorities in this country concur, that where the recusant passenger forces the company to put him off at a point other than a regular station, or at which there would have been no delay but for the necessity of ejecting him, the conductor may refuse his tender of fare after he is put off, and even if during the delay he gets upon the train again to make the tender, may expel him a second time, if he choose to do so. 3 Wood, Ry. Law, §§ 361, 362 and notes; 2 Wood, Ry. Law, § 298; Hoffbauer v. Davenport & N. W. R. Co., *supra*. Where a person is put off a train for refusal to pay fare at a regular station, or so near it that he can reach it, while the train is stopping there, and buys a ticket from such depot to some point in the direction in which he is traveling, the weight of authority is in favor of the rule that he can be required even then to pay charges for the distance that he previously rode on the train without a ticket, and ejected for refusal to do so. 3 Wood, Ry. Law, § 361; Stone v. Chicago & N. W. R. Co., 47 Iowa, 83. We think that there was error in the instruction given by the judge below.

After careful scrutiny of the evidence of every witness, we fail to find any testimony tending to show that tickets were sold at Campton, and to justify the instruction predicated upon the idea that it was a regular station. But, conceding that tickets were sold there, and that passengers sometimes got on and off there, it is in evidence and is not disputed that the particular train on which the defendant was traveling would not have stopped at Campton but for the purpose of expelling him from it. If that be true, both reason and authority sustain the right of the conductor to put him off, and to refuse him readmission, just as he might have done at any point on the line, where there was not even a house. If Campton was a regular station, and, while the train was detained there the plaintiff had bought a ticket to Hendersonville, and again entered the train, and tendered the fare from Spartanburg to that point, in money with the ticket, that state of facts would have presented a very different question. The ticket issued by its agent would have constituted a new contract on the part of the company, by which, with the tender of the amount previously due—and, according to some authorities, without it—the company would have been compelled to transport him on its train to Hendersonville. But it is not essential that we should pass upon that question. So far as this train was concerned on this particular occasion, the conduct of the plaintiff was the only cause for stopping it at

Campton. When the detention was due solely to his refusal to perform the implied contract growing out of his getting on the train, by paying the usual fare to his destination, the law will sustain the company in insisting that he shall pay the penalty of such persistent refusal by being himself subjected to inconvenience without compensation. His honor should have instructed the jury that, as the train was stopped only for the purpose of putting the plaintiff off, he was not entitled to recover damage for the refusal to accept fare after the train stopped, or for again ejecting him while the train was standing there. *O'Brien v. New York Cent. & H. R. R. Co.*, 80 N. Y. 236, 1 Am. & Eng. R. Cas. 259. There is error, for which a new trial will be granted.

Right of Passenger to Return to Train upon Tender of Fare after Train has been Stopped to Eject Him.—See *Pease v. Delaware & L. R. Co.* (N. Y.), 26 Am. & Eng. R. Cas. 185, note 189; *Hayes v. New York C. & H. R. R. Co.* (N. Y.) 18 *Id.* 363, note 365; *Clark v. Wilmington & W. R. Co.* (S. Car.), 18 *Id.* 366; *Louisville, N. & G. S. R. Co. v. Harris* (Tenn.), 16 *Id.* 374, note 379; *Skillman v. Cincinnati, S. & C. R. Co.* (Ohio), 13 *Id.* 31, note 36; *Garrett v. Louisville & N. R. Co.* (Tenn.), 3 *Id.* 416; *O'Brien v. New York C. & H. R. R. Co.* (N. Y.), 1 *Id.* 259.

Right of Expelled Passenger to Purchase Ticket and Claim Passage.—See *Swan v. Manchester & L. R. Co.* (Mass.), 6 Am. & Eng. R. Cas. 327.

BOYLAN

v.

HOT SPRINGS R. CO.

(*United States Supreme Court, November 11, 1889.*)

Passenger—Knowledge of Conditions in Ticket—Acceptance and Signing.—A passenger who assents to the contract contained in a ticket by accepting and signing it, is bound by the conditions expressed in it, whether he knew what they were or not, and evidence as to the time when he first knew the conditions is inadmissible in an action for breach of the contract of carriage.

Same—Waiver of Condition—Estoppel.—When, by the express conditions of a ticket accepted and signed by a passenger, the right to return upon such ticket is conditional upon its being signed and stamped by the station agent at the terminus of the route, and no agent or employe of the railroad company is authorized to alter, modify or waive any condition, the action of the baggage master in punching the ticket and checking the passenger's baggage or that of the brakeman in admitting him to the train, does not estop the railroad company from denying the passenger's right to transportation.

Same—Refusal to Pay Fare—Notice of Amount of Fare.—Where a person has failed to have a return ticket stamped as required by an express condition contained in it, and has absolutely declined to pay fare upon the train, the fact that the conductor did not inform him of the amount of the fare before ejecting him is immaterial.

Same—Assumpsit—Contract of Carriage.—When the contract of carriage contained in a ticket is not binding upon the company by reason of the passenger's failure to have the ticket stamped as required by an express condition contained in it, an action of *assumpsit*, sounding in contract, and not in tort, cannot be maintained to recover any damages, direct or consequential, for the passenger's expulsion, and evidence concerning the circumstances attending the expulsion and the consequent damages arising therefrom, is inadmissible.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of *assumpsit* against a railroad corporation by a person who, after taking passage on one of its trains, was forcibly expelled by the conductor. At the trial in the circuit court the plaintiff testified that on March 18, 1882, he purchased at the office of the Wabash, St. Louis & Pacific Railway Company, in Chicago, a ticket for a passage to Hot Springs and back (which is copied in the margin ' and which,

1. Issued by Wabash, St Louis and Pacific Railway. Tourist special contract. Good for one first-class passage to Hot Springs, Ark., and return, when officially stamped on the back hereof, and presented with coupons attached. In consideration of the reduced rate at which this ticket is sold, I, the undersigned, agree to and with the several companies over whose lines this ticket entitles me to be carried, as follows, to-wit: (1) That in selling this ticket the Wabash, St. Louis and Pacific Railway Company acts as agent, and is not responsible beyond its own line. (2) That this ticket is not transferable, and no stop over at any intermediate point will be allowed, unless specially provided for by the local regulations of the lines over which it reads. (3) That any alteration whatever of this ticket renders it void. (4) That it is good for going passage only five (5) days from date of sale, as stamped on back, and written below. (5) That it is not good for return passage, unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad, at Hot Springs, Ark., within fifty-five (55) days from date of sale, and when officially signed and dated in ink, and duly stamped by said agent, this ticket shall then be good only five (5) days from such date. (6) That I, the original purchaser, hereby agree to sign my name, and otherwise identify myself as such, whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads. (7) That baggage liability is limited to wearing apparel not exceeding \$100 in value. (8) That the coupons belonging to this ticket will not be received for passage, if detached. (9) That my signature shall be in manuscript and in ink. (10) That unless all the conditions on this ticket are fully complied with it shall be void. (11) That I will not hold any of the lines named in this ticket liable for damages on account of any statement not in accordance with this contract made by any employe of said lines. (12) And it is especially agreed and understood by me that no agent or employe of any of the lines named in this ticket has any power to alter, modify, or waive in any manner any of the conditions named in this contract.

Signature: P. C. BOYLAN.

Witness: H. C. KEERAN.

Date of sale, March 18th, 1882.

GEO. H. DANIELS, Gen'l Ticket Agent.

each valise, basket, or package too large to be carried on the lap of the passenger without incommoding others, five or ten cents, according to size." The packages consisted of three picture frames, done up in two parcels, and were about two feet in length, and nearly twenty inches in width. The plaintiff, when requested, refused to go on to the platform of the car or to leave it.

W. W. McFarland for appellant.

F. L. Backus for respondent.

BRADLEY, J.—The action was brought for an alleged assault and battery committed upon the plaintiff by the servants of the defendant in forcibly removing him from one of its cars on which he had taken passage. The defendant relied, for justification of the ejection of the plaintiff from the car, upon his alleged refusal to pay the additional fare required by the regulations of the company, when a passenger takes into its car a package too large to be carried on the lap of the passenger without incommoding others; and it is claimed that the plaintiff had a package which brought him within the operation of that regulation; and that he refused to pay such additional fare, as well as to leave the car, on request, before force was applied to remove him. It may be assumed that the regulation referred to was a reasonable one; and therefore, if the facts were as claimed on the part of the defendant, the use of the requisite force for the removal of the plaintiff from the car was justified. Such was the view of the trial court. But there was a controversy, in respect to facts, presented by conflicting evidence. It appears that the plaintiff paid to the conductor, and the latter received from him, the usual passenger fare of five cents. The testimony of the plaintiff was that he was not asked to pay any additional fare, but all that was required of him by the conductor, before he was taken out of the car, was that he either go out onto the platform or leave the car.

The questions were presented whether the package came within the rule which entitled the defendant to the additional fare, and, if it did, was the plaintiff requested or did he refuse to pay such fare before his ejection from the car? These were by the trial court treated as questions of fact, and submitted to the jury as such. The negative of either fact would entitle the plaintiff to recover. The latter was clearly a question of fact upon the evidence. In respect to the other proposition, the court was requested to hold as matter of law, and, charge the jury, that the bundles were too large to be carried on the lap of the passenger, without incommoding others. Except-

Obligation to
pay additional
fare for pack-
age—Question
of fact.

tion was taken to the refusal to so charge. And the court was further requested and declined to charge that "the question as to whether the packages were too large was not a matter to be decided by the plaintiff, but is to be decided by the defendant, and if its agents, in the exercise of fair judgment and in good faith, determine that a package is too large, and requires pay, the passenger must comply with a request to pay, or leave the car," and exception was taken to such refusal. For the successful operation of the road, and for the accommodation and comfort of its passengers, certain regulations are evidently essential. The one in question was reasonable, but that portion of it relating to the present case is indefinite, in so far that it does not in terms furnish all the information necessary to its execution, which is dependent upon the fact that the package is too large to be carried in the lap of the passenger without incommoding others. A package may be such and so large as to require the conclusion that it is within the rule which entitles the company to demand the increased fare, and in such case the court might as matter of law so determine. When it does not necessarily so appear, the question arising in that respect becomes one of fact, to be otherwise disposed of. In the present case the court could not hold that the package was within the meaning of those referred to in the regulation. The right of the plaintiff was dependent upon the application of the regulation to his package, and not upon the judgment of the conductor. The ability of the latter to construe the regulation, and to determine whether the package justified the demand of more fare, may have been greater than that of the plaintiff, but their right to exercise their judgments in that respect, subject to the consequences, was not unequal. The question was for the jury to determine whether the extent of the plaintiff's package was such as to be embraced within the meaning of the regulation. The question is one of the weight of evidence, which was solely for the consideration of the court below. If the execution of this portion of the regulation is liable to be attended with embarrassment, it is because its terms, descriptive of the packages referred to, are not sufficiently definite to furnish a certain guide to the company's servants, who are required to execute it.

There was no error in the reception of evidence of the number of passengers in the car when the plaintiff entered. While that fact had no bearing upon the question of the right of the plaintiff to ride without paying additional fare, it was descriptive of the situation. If all the seats had been full, there would have been some demonstration of the fact whether any of the others were incommoded by the package, as bearing

Evidence as to
number of
passengers in
car.

upon the question on the trial in that respect. And it was not improper to show the number present who saw the transaction which resulted in the removal of the plaintiff from the car. The court distinctly charged the jury that the number of passengers in the car, or the opportunity to carry a package because the number was small, had no importance on the question of the right of the defendant to require of the plaintiff the observance of the regulation, and on his refusal to do so to expel him from the car if his package was such as to justify it.

After this occurrence, and upon the complaint of the plaintiff, the matter of Policeman Campbell, who had been called upon by the conductor to assist in the removal of the plaintiff from the car, was brought to a hearing

Credibility of witnesses.

on that account before the police commissioner of Brooklyn, and the conductor and driver there testified as witnesses. On their cross examination, on the trial of the present case, they were by the plaintiffs' counsel asked whether they made certain statements on the hearing before the commissioner, and, after their answers, evidence was given that they testified otherwise there. This evidence was not competent on the merits as against the defendant, but, so far as the facts embraced within those statements were material to the issue on trial, the contradictory evidence was competent solely for the purpose of affecting the credibility of the witnesses. It must be assumed that was received for that purpose only, and therefore competent. It is for such purpose permitted, in that manner, to prove that a witness has made prior statements contradictory to those which he states on the trial, as bearing upon his credibility or reliability as a witness.

The plaintiff not only did this, but went further. The conductor, on his cross examination, was asked whether he testified before the commissioner that he told the plaintiff, on the occasion in question, that he could not ride inside the car because it was against the rules, unless he paid, referring to the additional fare on account of the package. The witness answered in the affirmative. Then, by way of contradiction, another witness who was present, and took the notes of evidence on that hearing, was asked, "Did he testify that he demanded that the plaintiff should pay for the frames, and that he refused to pay?" to which objection was made on the ground that the question was not asked the witness, that it was immaterial and collateral, and that the issue on the hearing was different from the one in this action. The objection being overruled, and exception taken, the witness answered to the effect that the conductor did not so testify, or testify to anything about

Testimony of conductor before commissioner.

paying for the package. This evidence was not contradictory of anything which the conductor stated on the hearing before the commissioner, and therefore did not come within the rule which permits evidence of that character to impeach the credit of a witness. The question to which the objection was taken was not whether the conductor had made any particular statement, prior to the trial, in conflict with that made by him on this trial, or whether he had made one which he on cross examination denied having made, but whether, on the former hearing, he had stated what on this trial he said he had there stated. The fact whether he had or not so testified on that hearing was not relevant to the issue in this action, although the fact whether he did demand payment was a material one upon such issue. The answer in the affirmative by the conductor, of the question put to him by the plaintiff's counsel, closed the inquiry in respect to the statement embraced in it. There was nothing to legitimately contradict. The witness by such answer testified that he had upon such hearing made the statement to which his attention was called by the question; and, inasmuch as the fact whether or not he had so testified was collateral and irrelevant in this action, the plaintiff was concluded in his inquiry by the answer given by the witness. The evidence was therefore incompetent. *Com. v. Hawkins*, 3 Gray (Mass.), 463; *Height v. People*, 50 N. Y. 392; *Hart v. Hudson River Bridge Co.*, 84 N. Y. 57.

The question whether the plaintiff was by the conductor asked and refused to pay the additional fare before he was put off the car was in dispute upon the conflicting evidence. And it cannot be seen that the evidence that the conductor made no statement to that effect on his examination as a witness before the police commissioner, shortly after the occurrence, may not have been prejudicial to the defendant upon that question of fact. For that reason, and for that error, the judgment should be reversed, and a new trial granted; costs to abide the event. All concur, except HAIGHT, J., not sitting.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO.

v.

ADCOX.

(Arkansas Supreme Court, January 18, 1890.)

Refusal to Designate Place as Flag Station—Reasonable Regulation.—The refusal of a railroad company to designate as a flag station for its through trains, a place which is not an incorporated town, which contains only a few houses and is situated within three miles of a regular station, is not an unreasonable regulation; and when the facts are uncontroverted, it is error for the court to submit to the jury the question of the reasonableness of such regulation.

Failure to Stop Train—Liability.—If a person is not informed by the agent from whom he purchased a return ticket, that the train upon which the agent knew the passenger proposed to return would not stop at that station, and the passenger was misled by the company's custom of habitually stopping its trains there upon being flagged, such passenger is entitled to recover damages.

APPEAL from Circuit Court, White County.

Action by J. E. Adcox against the St. Louis, Iron Mountain & Southern R. Co. for damages caused by the failure of the defendant to stop a train at a station after it had been flagged. The defendant appeals from a judgment for the plaintiff.

Dodge & Johnson for appellant.

T. J. Oliphint for appellee.

PER CURIAM.—1. The refusal of a railway company to designate as a flag station, for its through trains, a place which is not an incorporated town, which contains only a few houses, and is situated within three miles of a regular station, is not an unreasonable regulation. The facts being uncontroverted, it was the province of the court to declare the regulations reasonable. To submit the question to the jury for determination, under such circumstances, was simply to leave the matter to their discretion, which was error.

2. If the plaintiff, without fault of his, was misled by the company's custom into believing that the place was a flag station for night passenger trains, then his right to recover was the same as though he had been misdirected by its authorized agent. *St. Louis, I. M. & S. R. Co. v. Atchison*, 47 Ark. 74; *Hobbs v. Texas & P. R.*

Designation
of flag sta-
tion.

Failure to
stop train.

Co., 49 Ark. 357, 34 Am. & Eng. R. Cas. 268; 2 Wood, Ry. Law, 1174. It would be otherwise if he was not informed of, or had not relied upon, the custom, or if the stoppage of the trains was only casual, and not habitual. The charge upon that phase of the case was too restricted. If the company's agent, from whom the plaintiff purchased his return ticket, was informed and understood that the plaintiff purchased the ticket with the intention of using it to return from his destination on the night train, it was the agent's duty to notify him that the train would not stop at his destination; and the court so instructed the jury. If it were certain the agent had knowledge of the plaintiff's intent, and permitted him to act when it was his duty to speak, we would affirm the judgment, notwithstanding the errors pointed out; but the evidence is conflicting upon that point, and we cannot say how far the jury were misled by the false charge. The judgment must be reversed, and the cause remanded, for a new trial.

GRISWOLD

v.

WEBB.

(*Rhode Island Supreme Court, November 30, 1889.*)

Carriers of Passengers—Right to Enter Wharf—Regulation of Hack Drivers.
—Where the owner of a wharf, leased to a common carrier of passengers, brings an action of trespass against the driver of a hackney carriage, alleging that the plaintiff, in violation of the rules of the wharf, entered and remained upon the wharf at a place set apart for hackney carriages which had been licensed by the owner, it is a sufficient defense that the defendant went upon the wharf pursuant to a special contract to get a certain passenger who was to arrive at the wharf by boat, and was not there soliciting business.

TRESPASS *quare clausum*. Jury waived.

Francis B. Peckham and *Samuel R. Honey* for plaintiff.

William P. Sheffield and *William P. Sheffield, Jr.*, for defendant.

STINESS, J.—The plaintiff is owner of Commercial Wharf, in Newport, a part of which is leased to the Newport & Wickford Railroad & Steamboat Company as a terminus. To preserve order upon the wharf, stands are let for hackney carriages, and the following rules are prescribed

Facts.

for its use : " Rules for Hackmen and Others. (1) Drivers of hackney carriages shall remain on or near their carriages, except when carrying baggage to or from them. (2) No one shall occupy a hack-stand or express stand except the licensee or his employes. (3) No hackney carriage or express wagon shall stand on the space to the eastward of the restaurant building, or on the roadways, except on licensed hack stands, even though ordered in advance by a passenger." East of the restaurant building is a plank walk for passengers, and east of the walk a space is reserved for private carriages. The rest of the wharf is used for sidewalks, roadways, and buildings. The defendant, driver of a hackney carriage in Newport, went to the wharf, on the day in question, for a lady who was to arrive in the boat, as he had been ordered to do by the passenger, or some one in her behalf. He backed his hack as near as he could to the space reserved for private carriages, when he was ordered to leave the wharf by the superintendent, upon the ground that he had no right to be there, having no license from the owner. The plaintiff claimed that the wheels of the defendant's carriage were backed on to the plank walk, but upon all the testimony, we are not satisfied this was so, or, if so, that it was anything more than accidental. At any rate, the order to leave the wharf was not put upon this ground, but because he had no right there. Upon receiving the order to leave, the defendant stated, both to the plaintiff and to the superintendent of the wharf, that he had been ordered there for a passenger, and he refused to leave. The plaintiff then called a policeman, who moved the carriage to another place in the roadway, where the defendant remained until the boat arrived, when he took his passenger and drove away. The passenger was an infirm lady, who had been accustomed to ride with the defendant, and one who was obliged to use a stool, which he had with him, to aid her in getting into the carriage. The plaintiff sues in trespass, and the defendant justifies under a right as servant of the passenger. The question is whether the defendant had the right to enter and remain upon the wharf to take the passenger, notwithstanding the rules and the order to leave. We understand the rules to forbid an unlicensed hackney carriage to stand upon the wharf at all ; for none are allowed to stand in the roadways, except on the licensed stands, and none are allowed to occupy a stand without a license. But the wharf is leased to a common carrier of passengers, with a provision that the space east of the restaurant shall be reserved for the use of private carriages of passengers arriving at the wharf.

The question of right, therefore, is the same as it would be

between passengers and a company which owns its terminus. While such ownership carries with it a right of control, in most respects the same as in private property, a railroad station or steamboat wharf is, to some extent, a public place. The public have the right to come and go there for the purpose of travel; for taking and leaving passengers; and for other matters growing out of the business of the company as a common carrier. But the company has the right to say that no business of any other character shall be carried on within the limits of its property. It has the right to say that no one shall come there to solicit trade, simply because it may be convenient for travellers, and so to say that none, except those whom it permits, shall solicit in the business of hacking or expressing. When notice of such prohibition has been given, the license which otherwise might be implied is at an end, and it is the duty of persons engaged in any such business to heed the notice and to retire from the premises. *Barney v. Oyster Bay & H. Steamboat Co.*, 67 N. Y. 301; *Com. v. Power*, 7 Metc. (Mass.) 596.

Right of public to use wharf.

But, while this is so, the company cannot deprive a passenger of the ordinary rights and privileges of a traveller, among which is the privilege of being transported from the terminus in a reasonably convenient and usual way. A company cannot compel a passenger to take one of certain carriages, or none at all; nor impose unreasonable restrictions, which will amount to that.

Right of traveller to go upon wharf with carriage.

If a passenger orders a carriage to take him from the terminus, such carriage is, *pro hac vice*, a private carriage: not in the sense that the passenger has a special property in it, so as to be liable for the driver's negligence, but in the sense that it is not "standing for hire." *Masterson v. Short*, 33 How. Pr. (N. Y.) 481. The driver is not engaged in his vocation of soliciting patronage, but is waiting to take one with whom a contract has already been made. No question is made that a passenger may have his own carriage enter the premises of a carrier to take him away; but to say that one who is not so fortunate as to own a carriage shall not be allowed to call the one he wants, because it is a hackney carriage, would be a discrimination intolerable in this country. Yet this is really the plaintiff's claim. Every passenger has the right, upon the premises of the carrier, to reasonable and usual facilities for arrival and departure; and, so far as this includes the right to be taken to and from a station or wharf, it is immaterial whether he goes in a private or a hired carriage.

Decisions upon this question have not been numerous, and

we know of but one directly in point, although in others there are *dicta* which indicate what is understood to be the law. *Summitt v. State*, 8 Lea (Tenn.), 413 was a conviction of the defendant, a watchman in a depot, for assault in ejecting a hackman therefrom. The company had forbidden hackmen to enter the building. Notwithstanding this rule, the right of a hackman to go into a part of the depot to obtain the baggage of a passenger, whose check he had, was not controverted. The prosecutor, having the check of a passenger, was in another part of the depot; but it was held that the defendant was not justified in ejecting him altogether from the station, and the conviction was sustained. *Tobin v. Portland, S. & P. R. Co.*, 59 Me. 183, was an action for damages by a hackman who was injured by stepping on a defective platform when leaving a passenger at the station. The court say: "The hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting." In this case it was not claimed that any rules had been violated. The recent case of *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 33 Am. & Eng. R. Cas. 488, was an action of trespass against an expressman who solicited patronage in the plaintiff's station, contrary to its rules. W. ALLEN, J., says: "Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it." A statute of Massachusetts prescribes that railroad corporations shall give to all persons equal facilities for the use of its depot. The court held that this statute applied only to the relations between common carriers and their patrons, or those who had the right to use the station. It did not give the defendant the right to go there to solicit business because another had the right. See, also, *Harris v. Stevens*, 31 Vt. 79. In *Markham v. Brown*, 8 N. H. 523, an action of trespass, brought by an innkeeper against a stage driver, the court say the defendant had clearly a right "to go to the plaintiff's inn with travelers, and he might of course lawfully enter it for the purpose of leaving their baggage and receiving his fare." The case most nearly in support of the plaintiff's contention of those we have seen is *Barker v. R. Co.*, 18 C. B.

46, where it was held that an omnibus proprietor, carrying passengers to and from a station, could not maintain an action for a refusal to allow him to drive his vehicle into the station yard. As the proprietor was not using or seeking to use the railway, it was considered that the company owed him no duty. JERVIS, C. J., said a passenger would, no doubt, have a right of action, if unduly obstructed, but a violation of duty to him would not give an action to the plaintiff. It is to be observed that the recent English cases are mainly controlled by statute, (17 & 18 Vict. chap. 31,) to which the Massachusetts statute is similar. They relate chiefly to the question whether a prohibition to one, to ply for passengers within a station, when the same right is granted to another, is an undue preference, under the statute. It is generally held that it is not. See *In re Beadell*, 2 C. B. (N. S.) 509; *In re Painter*, *Id.* 702; *Hole v. Digby*, 27 Wkly. Rep. 884. In the latter case it seems to be conceded that one going, *bona fide*, to meet a passenger, would not be guilty of trespass. *In re Marriot*, 1 C. B. (N. S.) 499, the defendant company was ordered to admit the complainant's omnibus into the station to receive and set down passengers and goods, as other public vehicles were admitted. Upon the question before us, we do not think these cases are in conflict with the views we have above expressed. The case at bar differs from *Barker v. Railroad Co.*, *supra*, in this: that here the hackney driver is not plaintiff, seeking to recover damages for the revocation of a license to go upon the wharf, or for a breach of duty to another, but the defendant against an alleged trespass, who relied upon his right as servant of the other to justify his being there.

We think the justification is sufficient. It is substantially given by the terms of the lease to the steamboat company. This does not deprive the owner of the general control of his wharf, nor interfere with his reasonable rules for its management. It simply secures to a passenger the common privilege of a passenger, and enables the hackney driver to shield himself from an apparent violation of the rules only when he is acting, *bona fide*, as the servant of such passenger. This qualification guards the owner from an incursion of unlicensed drivers under a mere pretense of serving passengers, and also confines the right of soliciting business on his premises to those whom he may permit. We give judgment for the defendant for his costs.

Rules as to Admission to Stations.—See *Fluker v. Georgia R. & B. Co.* (Ga.), 38 Am. & Eng. R. Cas. 379; *Old Colony R. Co. v. Tripp* (Mass.), 33 *Id.* 488, note 496.

BRICKER

v.

CALDWELL *et al.**(Pennsylvania Supreme Court, January 6, 1890.)***Who are Passengers—Travelling in Mail Car—Liability of Company.—**

Where a person enters a car which he knows is not provided for the transportation of passengers but is devoted to other purposes,—*e. g.*, the railway mail service,—and he is on the train without the knowledge or consent of the company and in a place where its employes would not, in the discharge of their ordinary duties, discover him, he is not a passenger, although he was there in good faith and with the intention of paying fare; and the company owes no duty to safely carry him.

ERROR to the Court of Common Pleas, Philadelphia County.

Action by Elizabeth S. Bricker, widow of Jacob L. Bricker, for herself and her children, against Stephen A Caldwell and another, receivers of the Philadelphia & Reading R. Co. to recover damages for negligently causing the death of, plaintiff's husband, who was alleged to have been a passenger upon one of the defendant's trains. The plaintiff brings error to review a judgment of nonsuit.

I. Y. Sollenberger and *C. Stuart Patterson* for plaintiff in error.

Thomas Hart, Jr., for defendants in error.

MCCOLLUM, J.—There is no evidence in this case which warrants an inference that the defendant company accepted

Facts. Bricker as a passenger on its train from Port Clinton to Tamaqua. He entered a car which he knew was not provided for the transportation of passengers. He was on the train without the knowledge or consent of the company, and in a place where its employes in the discharge of their ordinary duties would not discover him. It was a place devoted exclusively to the railway mail service, and in charge of one of its employes. He was confronted by an order of the superintendent of that service, forbidding him to remain there. He was not there for any purpose

which related to a duty of the company in the transportation of its passengers or their baggage. Upon these undisputed facts appearing in the plaintiff's evidence, no contract for safe carriage existed between the company and the deceased.

A "passenger," in the legal sense of the word, is "one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier; as the payment of fare or that which is accepted as an equivalent therefor." *Pennsylvania R. Co. v. Price*, 96 Pa. St. 256, 1 Am. & Eng. R. Cas. 234. In *Whart. Neg. § 354*, the undertaking of the carrier is thus defined: "A carrier, in undertaking to carry passengers safely, undertakes to carry them safely if they place themselves under his direction in particular places prescribed for the purpose; and he will not be held liable for damages accruing to an interloper, who, unnoticed by him, hides in the crevices of a locomotive, or in the hold of a ship." In *Patt. Ry. Accident Law, § 214*, it is stated "that the existence of the relation of carrier and passenger is dependent upon the making of a contract of carriage. From this it follows that railways are not liable to persons who have not been accepted as passengers, and the intention of the person to pay his fare and his good faith are immaterial, where there has been no contract, express or implied, on the part of the railway." These quotations from standard text-books correctly state the law on the subject to which they refer. As Brinker was not a passenger, and was on the train without the consent, express or implied, of the company, it owed him no duty, and the nonsuit was rightly ordered. In this view of the case, it is unnecessary to consider whether, if he had been accepted as a passenger, he was guilty of negligence which contributed to the injury he received, and which caused his death. Judgment affirmed.

Who are
passengers.

Who are Passengers—Persons Traveling in Mail and Baggage Cars.—See *Reary v. Louisville, N. O. & T. R. Co. (La.)*, 34 Am. & Eng. R. Cas. 277; *Houston & T. C. R. Co. v. Clemmons (Tex.)*, 8 *Id.* 396; *Kentucky, etc., R. Co. v. Thomas (Ky.)*, 1 *Id.* 79.

40 A. & E. R. Cas.—44

COLEMAN

v.

GEORGIA RAILROAD & BANKING CO.

(Georgia Supreme Court, November 27, 1889.)

Carriers—Liability for Injury to Person Assisting Passenger.—One who gets upon a fast mail train during one of its fixed stops at a station, where these are too short for him to transact his business and get off, has no right to notice, by signal or otherwise, to alight before the train resumes its journey; it not appearing that the conductor or other proper agent, knew that he had come aboard, nor that there was any usage or custom to give notice or make signals for the benefit of such visitors. This applies to a father, who, in conformity to a known custom of travel, attends his daughter, at her request, under circumstances rendering such attendance necessary, to aid her and her infant children to enter the train and secure seats as passengers. If, while he is in the car, the train starts before he has finished his undertaking, he must either remain until he can make known his wish to get off, or take the risk of alighting while the train is in motion.

ERROR from Superior Court, Walton County.

Rogers & Upshaw for plaintiff in error.

J. B. Cumming and *H. D. McDaniel* for defendant in error.

BLECKLEY, C. J.—The material allegations in the declaration were these: "Plaintiff bought a ticket for his daughter and two children, one three years, the other eight months old, from Social Circle to Atlanta. When the train known as the 'Fast Mail' reached Social Circle, he aided her and the children to get on the train, and went in the car, to see that she and they were comfortably seated. This it was proper for him to do, on account of the age of the children, and because his daughter had no assistant, and was carrying a couple of bundles or boxes, and because the conductor did not offer to aid her. Plaintiff did not have a reasonable time to seat his daughter and children and get off the train before it started. Before he could seat her, and without allowing him a reasonable time to do so, and get off, the train suddenly started, without blowing the whistle of the engine, or otherwise giving him notice that it was about to start. So soon as he discovered the train was in motion, and while it was moving very slowly, he started

to get off. He walked out of the car onto the platform, then stepped down to the bottom step, and whilst the car was moving very slowly, stepped off upon the ground, as he thought, but it may have been upon something negligently put there by the company. He used all ordinary and reasonable care and diligence in stepping from the train, was in the full possession of his physical vigor, and had no baggage to incumber him; and his getting hurt was the result of no fault on his part, but was the result of negligence on the part of the company in not giving him a reasonable time to get on and off the train, in starting without giving notice, in not providing proper persons or assistants to aid passengers on the train, in fixing the stop at the station too short, in having a very rough right of way by throwing in round rocks, in suddenly jerking the cars, as he was about to step off, and in other respects." By amendment to the declaration, these averments were added: "By the time plaintiff, with his daughter and her children, got inside the ladies' car the train started, without giving any signal, and without giving him a reasonable time to put his daughter and children on board the cars and get off before the train started. He had a right to attend his daughter and children into the car where she was to be conveyed, being requested by her to do so, and it being necessary for him to get on board, to safely place them. He had a right to be there, and to be duly notified, by signal or otherwise, of the starting, so that he could pass therefrom with safety. By gross negligence the train was started without giving him any such signal or other notice, and he was injured without any negligence on his part in attempting, at the time the train started, to pass from it to the platform. He was injured by the negligence of the employes and agents of the company. It was the custom of female passengers to have assistants to see them safely on and off the cars, which was known to the company, and not objected to." The injuries were described, and damages were laid at \$5,000. The company demurred generally to the declaration. The court sustained the demurrer, and dismissed the action.

It is not alleged in the declaration that either the company or any of its agents or employes had notice that the plaintiff was upon the train, or that he desired to get off; nor is it alleged that it was usual or customary for the company to make signals in order to warn persons to get off who might have come as attendants upon female passengers, and not to be carried as passengers themselves. Although it is alleged that the conductor offered no aid, it is not alleged that the conductor was present at the time and place when and where the plaintiff

Liability to
persons assist-
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and his daughter boarded the train, or that he even saw them. Tested by *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.), 64, the plaintiff was not entitled to recover. There it was held that the person coming on board with an infirm passenger was not entitled to special notice, and the evidence was conflicting as to whether usual or customary notice, by ringing bells, crying "All aboard!" etc., was given. Tested by *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27, the right to recover would be very doubtful; for there it is said it was the plaintiff's business to make himself acquainted with the usual delay of the train at the station, and with the usual signal for the starting of the train, and, if that signal was given in time for the plaintiff to have left the cars, his delay was at his own risk. This implies that there was some evidence in the case to the effect that there was a usage in the matter of giving signals. Here, as we have said, there is no allegation that such a custom existed. It is alleged that the train was a fast mail, and that the fixed stop at Social Circle was too short. There is no intimation that the plaintiff did not know what the fixed stop for that station was before he entered the cars, or that he did not know it was too short. If he had such knowledge, he should have requested an extension of the stop for that occasion, or at least have given some notice that he was going aboard and desired to get off. This notice he might at least have given to the ticket agent from whom he bought the tickets, if not directly to the conductor. Tested by the case of *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542, the plaintiff here could not recover, because in that case the conductor either knew, or should have known, from what he saw, that the invalid passenger came on board by the aid of attendants. Here there is no allegation whatever of any communication with the conductor, or any knowledge by him, or any other agent of the railroad company, that the plaintiff would, or did, attend his daughter in boarding the cars and becoming seated. So far as appears, no act done by the plaintiff after he purchased the tickets took place in the sight or hearing of any agent or employe of the company. Under such circumstances, we cannot hold that any act or omission alleged in the declaration, or that all of them put together, constituted a breach of any duty which the company owed to the plaintiff. The *dictum* in *Stiles v. Atlanta & W. P. R. Co.*, 65 Ga. 375, 8 Am. & Eng. R. Cas. 195, to the effect that a person on board for certain purposes might have all the rights of a passenger, is, if law at all, to be restricted to persons who are on board with the knowledge of those agents or servants of the company whose diligence is charged with their safety. *Griswold v. Chicago & N. W. R. Co.*, 64 Wis.

652, 23 Am. & Eng. R. Cas. 463. With such knowledge, the weight of authority would seem to be that ordinary, not extraordinary, diligence would be the rule. But, even in the case of a passenger, there would be no requirement upon the company to allow him time to get off at a particular station, unless he made it known, or it could be known from his ticket, or otherwise, that he desired to get off there. We conclude that the court committed no error in sustaining the demurrer and dismissing the action. Judgment affirmed.

Responsibility of Railroad Companies to Persons Entering Trains to Assist Passengers.—See *Griswold v. Chicago & N. W. R. Co.* (Wis.), 23 Am. & Eng. R. Cas. 463.

QUIMBY

v.

BOSTON & MAINE R. CO.

(*Massachusetts Supreme Judicial Court, January 1, 1890.*)

Pass—Stipulation Exempting from Liability.—A railroad company which gives gratuitously a pass upon a railroad train, may stipulate that the person accepting it shall assume all risk of accident which may happen while travelling upon the train.

Same—Validity of Stipulation—Signature by Passenger.—Although a free pass containing a condition exempting the railroad from liability for accidents, requires that the pass should be signed; a person who has accepted such pass and used it for the purpose of travelling, is estopped to deny that he made the agreement releasing the company from liability because he did not and was not required to sign it.

ON report from Superior Court, Essex County.

Tort by Asahel Quimby against the Boston & Maine R. Co., for damages for personal injuries sustained by the plaintiff while travelling upon the defendant's railroad.

H. P. Moulton for plaintiff.

S. Lincoln for defendant.

DEVENS, J.—When the plaintiff received his injury he was travelling upon a free pass given him at his own solicitation, and as a pure gratuity, upon which was expressed his agree-

ment that, in consideration thereof, he assumed all risk of accident which might happen to him while travelling on or getting off the trains of the defendant railroad corporation on which the ticket might be honored for passage. The ticket bore on its face the words, "provided he signs the agreement on the back hereof." In fact the agreement was not signed by the plaintiff, he not having been required to do so by the conductor who honored it as good for the passage, and who twice punched it. The fact that the plaintiff had not signed, and was not required to sign, we do not regard as important.

Acceptance of
pass. Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. *Squire v. New York Cent. R. Co.*, 98 Mass. 239; *Hill v. Boston, H. T. & W. R. Co.*, 144 Mass. 284, 28 Am. & Eng. R. Cas. 87; *Boston & M. R. Co. v. Chipman*, 146 Mass. 107, 34 Am. & Eng. R. Cas. 336. The object of the provision as to signing is to furnish complete evidence that the person to whom the pass is issued assents thereto; but one who actually avails himself of such a ticket, and of the privileges it confers, to secure a passage, cannot be allowed to deny that he made the agreement expressed therein, because he did not and was not required to sign it. *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 643, 26 Am. & Eng. R. Cas. 274; *Illinois Cent. R. Co. v. Read*, 37 Ill. 484; *Wells v. New York Cent. R. Co.*, 24 N. Y. 181; *Perkins v. New York Cent. R. Co.*, *Id.* 196. If this is held to be so, the case presents the single inquiry whether such a contract is invalid, which has not heretofore been settled in this state, and upon which there has been great contrariety of opinion in different courts. If the common carrier accepts a person as a passenger, no such contract having been made, such passenger may maintain an action for negligence in transporting him, even if he be carried gratuitously. Having admitted him to the rights of a passenger, the carrier is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to those who have paid him for the service. *Files v. Boston & A. R. Co.*, 149 Mass. 204; *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.), 18; *Com. v. Vermont & M. R. Co.*, 108 Mass. 7; *Littlejohn v. Fitchburg R. Co.*, 148 Mass. 478, 37 Am. & Eng. R. Cas. 54; *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.), 468; *New World v. King*, 16 How. (U. S.), 469. But the question whether the carrier may, as the condition upon which he grants to the passenger a gratuitous passage, lawfully make an agreement with him by which the passenger must bear the risks of transportation, obviously differs from this.

In a large number of cases the English decisions, as well as

those of New York, have held that where a drover was permitted to accompany animals upon what was called a "free pass," issued upon the condition that the user should bear all risks of transportation, he could not maintain an action for an injury received by the negligence of the carrier's servants. A similar rule would without doubt be applied where a servant from the peculiar character of goods, as delicate machinery, was permitted to accompany them, and in other cases of that nature. That passes of this character are "free passes," properly so called, has been denied in other cases, as the carriage of the drover is a part of the contract for the carriage of the animals. The cases on this point were carefully examined and criticised by Mr. Justice BRADLEY in *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.), 367, and it is there held that such a pass is not gratuitous, as it is given as one of the terms upon which the cattle are carried. The decision is put upon the ground that the drover was a passenger carried for hire, and that with such passenger a contract of this nature could not be made. The court, at the conclusion of the opinion, expressly waives the discussion of the question here presented, and, as it states, purposely refrains from expressing any opinion as to what would have been the result had it considered the plaintiff a free passenger instead of one for hire. *Grand Trunk Ry. of Canada v. Stevens*, 95 U. S. 655, in which the same distinguished judge delivered the opinion of the court, is put upon the ground that the transportation of the defendant, although not paid for by him in money, was not a matter of charity or gratuity in any sense, but was by virtue of an agreement in which the mutual interest of the parties was consulted.

Whether the English and New York authorities rightly or wrongly hold that one travelling upon a "drover's pass," as it is sometimes called, is a free passenger, they show that, in the opinion of these courts, a contract can properly be made with a free passenger that he shall bear the risks of transportation. This is denied by many courts whose opinions are entitled to weight. It will be observed that in the case at bar there is no question of any wilful or malicious injury, and that the plaintiff was injured by the carelessness of the defendant's servants. The cases in which the passenger was strictly a free passenger, accepting his ticket as a pure gratuity, and upon the agreement that he would himself bear the cost of transportation are comparatively few. They have all been carefully considered in two recent cases, to which we would call attention. These are *Griswold v. New York & N. E. R. Co.*, 53 Conn. 371, 26 Am. & Eng. R. Cas. 280, (1885,) and that of *Gulf, C. & S. F. R. Co. v. McGown*,

Drovers' passes.

Stipulations in free passes.

ubi supra, (1886,) in which the precise question before us was raised, and decided, after a careful examination of the authorities, in a different manner by the highest court of Connecticut and that of Texas. No doubt existed in either case, in the opinion of the court, that the ticket of the passage was strictly a gratuity, and it was held by the former court that, under these circumstances, the carrier and the passenger might lawfully agree that the passenger should bear the risks of transportation, and that such agreement would be enforced, while the reverse was held by the court of Texas. We are brought to the decision of the question unembarrassed by any weight of authority without the commonwealth that can be considered as preponderating.

It is urged on behalf of the plaintiff that, while the relation of passenger and carrier is created by contract, it does not follow that the duty and responsibility of the carrier are dependent upon the contract; that while with reference to matters indifferent to the public, parties may contract according to their own pleasure, they cannot do so where the public has an interest; that, as certain duties are attached by law to certain employments, these cannot be waived or dispensed with by individual contracts; that the duty of the carrier requires that he should convey his passengers with safety; that he is properly held responsible in damages if he fails to do so by negligence, whether the negligence is his own or that of his servant's, in order that this safety may be secured to all who travel. It is also said that the carrier and the passenger do not stand upon an equality; that the latter cannot stand out and higgler or seek redress in courts; that he must take the alternatives the carrier presents, or practically abandon his business in the transfer of merchandise, and must yield to the terms imposed on him as a passenger; that he ought not to be induced to run the risks of transportation for being allowed to travel at a less fare, or for any similar reason, and thus to tempt the carrier or his servants to carelessness which may affect others as well as himself; and that, in a few words, public policy forbids that contracts should be entered into with a public carrier by which he shall be exonerated from his full responsibility. Most of this reasoning can have no application to a strictly free passenger, who receives a passage out of charity or as a gratuity. Certainly the carrier is not likely to urge upon others the acceptance of free passes, as the success of his business must depend on his receipts. There can be no difficulty in the adjustment of terms where passes are solicited as gratuities. When such passes are granted by such of the railroad officials as are authorized to issue them, or other public carriers, it is in deference largely

to the feeling of the community in which they are exercising a public employment. The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares; in both of which subjects the public is interested. In such instances one who is ordinarily a common carrier does not act as such, but is simply in the position of a gratuitous bailee. The definition of a "common carrier," which is that of a person or corporation pursuing the public employment of carrying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger, he consents, for the time being, to put off his public employment, and to do that which it does not impose upon him. The plaintiff was in no way constrained to accept the gratuity of the defendant. It had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, also to be responsible to him in damages for the negligence or its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that besides the gift of free transportation the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him.

In some cases it has been held that while a carrier cannot limit his liability for gross negligence, which has been defined as his own personal negligence (or that of the corporation itself, where that is the carrier), he can contract for exemption from liability for the negligence of his servants. It may be doubted whether any such distinction in degrees of negligence, and the right of a carrier to exempt himself from responsibility therefor, can be profitably made or applied. *New World v. King*, 16 How (U. S.), 469. It is to be observed, however, that in the case at bar the injury occurred through

the negligence of defendant's servants, and not through any failure on the part of the corporation to prescribe proper rules or furnish proper appliances of the conduct of its business. We are of opinion that where one accepts, purely as a gratuity, a free passage upon a railroad train, upon the agreement that he will assume all risk of accident which may happen to him, while traveling on such train, by which he may be injured in his person, no rule of public policy requires us to declare such contract invalid and without binding force. By the terms of the report there must therefore be judgment for defendant.

Free Passes—Validity of Stipulation Exempting from Liability.—See *Ulrich v. New York C. & H. R. R. Co.* (N. Y.), 34 Am. & Eng. R. Cas. 350, note 354; *Camden & A. R. Co. v. Bausch* (Pa.), 28 *Id.* 142; *Annes v. Milwaukee & N. R. Co.* (Wis.), 27 *Id.* 102; *Griswold v. New York & N. E. R. Co.* (Conn.), 26 *Id.* 280; *Gulf, C. & S. F. R. Co. v. McGowan* (Tex.), 26 *Id.* 274; *Abell v. Western Maryland R. Co.* (Md.), 21 *Id.* 503; note 21 *Id.* 155; *Seybolt v. New York, L. E. & W. R. Co.* (N. Y.), 18 *Id.* 162, note 170; *Kimball v. Boston, C. & M. R. Co.* (Vt.), 13 *Id.* 55, note 57, 58; *Buffalo, P. & W. R. Co. v. O'Hara* (Pa.), 9 *Id.* 317.

Liability to Persons Travelling upon Drover's Passes.—See *Missouri Pac. R. Co. v. Ivey*, 37 Am. & Eng. R. Cas. 46, note 53.

EUREKA SPRINGS R. CO.

v.

TIMMONS.

(*Arkansas Supreme Court, May 25, 1889.*)

Passengers—Liability of Company Using Another Company's Road.—A railroad company which was operating its trains over the road of another company at the time when an accident occurred to a passenger, is liable at common law as a common carrier.

Conflict of Laws—Law in Force in Another State—Presumption.—In the absence of proof to the contrary, the Arkansas courts will presume that the common law is in force in another state.

Passenger—Erroneous Instruction—Harmless Error.—Where a passenger sues for damages for personal injuries, an instruction that "before defendant can excuse itself, it must show, by a preponderance of testimony, that its track and machinery and appliances were the best of the kind, and in perfect condition," is not sufficient ground for reversal when the correct rule of law is stated in another instruction given at the defendant's request.

Same—Prima Facie Evidence of Negligence.—In an action for injuries to a passenger, evidence that the car in which the plaintiff was travelling left the track, is *prima facie* evidence of negligence, but the presumption arising therefrom may be rebutted by showing that the injury arose from an unavoidable accident, or an occurrence which could not have been prevented by the utmost skill, foresight and diligence.

APPEAL from Circuit Court, Carroll County.
Crump & Watkins for appellant.
 The appellee *pro se*.

HUGHES, J.—While a passenger in one of the coaches on a railway of appellant, *en route* from Seligman, Mo., to Eureka Springs, Ark., appellee received personal injuries, by the coach in which he was seated leaving the track of the road, and turning over down an embankment. The complaint alleges that the appellant was at the time operating its road from Eureka Springs, Ark., to Seligman, Mo., and that appellant was guilty of negligence in using defective machinery, and in operating its road, which was the cause of appellee's injury. Appellant denied negligence, denied that appellee was injured, and denied that one of its coaches was thrown from the track; and alleged that that part of said railroad from the Missouri line to Seligman, Mo., was owned by the Missouri & Arkansas Railway Company, a corporation organized and existing under the laws of Missouri, but did not deny that it was operated by the Eureka Springs Railway Company (the appellant). There was evidence tending to show that the train consisted of a combination car, passenger coach, and engine, and was going down a steep grade, at the rate of 15 or 16 miles an hour or over: that the rear car jumped the track, ran some three or four hundred feet, came uncoupled, and turned over, down a steep embankment; that the appellee was in this car; that the car ran off the track within one and a half or two miles of Seligman; that there was at the time no brakeman on the rear car; that appellee was injured in the hand, arm, thumb, and leg. Facts.

Some of the witnesses testified that the train at the time the car ran off the track was running 25 or 30 miles an hour. Edward Church, the engineer in charge of the train, testified that he examined the air brakes and machinery before he left Seligman, and just before the accident occurred, and that they were in good condition; that just before the car turned over he received a signal to stop, and applied the air brakes, and about this time received a signal to go, and then he attempted to release the brakes, and could not do it, but that he could not see the rear car, but that his fireman said that it was off the track, and then he reversed the engine, and stopped the train, and that, as the train stopped, the rear car came uncoupled, and turned over on its side. He testified that "the train ran about 150 feet with a wheel off the track before I received the first signal. After receiving the first signal, we ran about 150 feet, when train stopped." He stated "there were two brakemen on the train Testimony.

that day;" that the position of one was at the front end of the combination car, and of the other on the rear end of the train; that the duty of the brakeman on the passenger train is to take up slack of brakes, and see that the couplings are secure at all times, and to receive any signals from the engineer, and, in case of accident, to apply brakes; that it is a fact that these brakemen can stop the cars when the air brakes fail to work for the engineer; that it is about 150 feet from where the wheel left the track to where the engineer got the first signal; that immediately there were two taps of the gong, which meant go on. "When I attempted to release the brakes, I detected there was something wrong with the brakes; that the air wouldn't release freely. When I told the fireman to look out and see what was the matter, and he said the rear car was off the track, and at that time the rear car had not turned over, and I immediately reversed the engine." "The bell rope was working properly before, up to the time of the stopping of the car." "Successive ringing of the bell about half a minute before the train stopped." Powell Clayton testified that the "rails are steel rails of the very best order. The track is an unusually good one. The track on the day of the accident was in excellent condition. The machinery was of the best and improved kind." That he "examined track; it was in perfect condition. If the train had been running 25 or 30 miles an hour, it could not have been stopped in the distance it was. From where the truck got on the rail to where the car turned over was about 400 feet; certainly not 500 feet. It would not attract attention so long as the truck was on the rail. It ran on the rail about 30 feet." Also that, "in case of an accident, the car conductor should either ring the bell for brakes, or run to the water-closet, and apply the air brakes himself." J. B. Obenchain testified: "Examined air brakes on the coach that came in after the accident, and they were all right. Perhaps at the speed they were running, if the cars were on the track, they would stop at 150 feet. If the truck was off the rail, can't say how long it would take, (that is, supposing the train be constructed as it was.) The stopping of the train at distance I have mentioned depends upon whether everything was quiet, and no confusion, and there was prompt action." He also testified that he was the master mechanic for the company, and that his duty was to look after and keep up machinery; that he examined the wheels and boxes on the morning before the accident; that there was no defect in the machinery, save, after the accident, "one wheel was out of shape. Could not discover any defect in rail. It must have gone 140 or 150 feet from where it ran off." "Train running on that grade,

at 15 miles an hour, if heavily loaded, must run 160 or 170 feet before it could be stopped. It is owing to the load. If it was running 25 or 30 miles an hour, it would perhaps run 200 or 250 yards before it could be stopped. I can give no explanation of why the accident occurred, or the cause of it. The road was in good condition. The car had been to Pierce City after I examined it. Can't say when the wheel got out of shape. The fact of the wheel running over the track and ties would likely have damaged the wheel." This was substantially the evidence.

The court, at the request of the plaintiff, instructed the jury that, "that if the defendant undertook to carry the plaintiff outside of their charter authority, or by a different conveyance, or time of conveyance, the defendant would be liable as a common carrier for such injuries as are sustained by the plaintiff through defendant's negligence. (2) That the running of a passenger train of cars off the track is *prima facie* evidence of negligence, either as to the condition and care of the track, or careful running of the train, and, if proven, it shifts the burden of proof onto the company to show a proper construction and condition of the track, and careful running of the train, or such facts, if any, as will excuse it from liability. (3) If the jury find for the plaintiff, they will take into consideration, in assessing his damages, his mental and bodily pain and anguish, his incapacity to labor and the permanency of his injuries, if such elements of damage be shown by the proof. (4) If the plaintiff shows *prima facie* negligence on the part of the defendant, then, before defendant can excuse himself, it must show by a preponderance of the testimony that its track and machinery and appliances were the best of the kind, and in perfect condition, and that the servants of the defendant used proper care in the running of the train, and, after they had notice of an imperiling accident, that they used every effort in their power to avoid it." To the giving of instructions 3 and 4 for plaintiff, defendant excepted. At defendant's request the court gave the following instructions: "(1) The court instructs the jury that it is the duty of all railroad companies to use all reasonable means and efforts to furnish good and well-constructed machinery, adapted to the purpose of its use, of good material, and of a kind that is found to be the safest when applied to use; and if you find that defendant used these means, and that the accident occurred by reason of a defect in the machinery of the said defendant which they, by the exercise of all reasonable care and skill, could not detect, then you will find for the defendant. (2) If you find from the evidence that the defendant had used

Instructions.

all the proper means in its power to furnish the proper track, and the best and most approved material and appliances for the carrying of passengers, and you further find from the evidence that the injury was caused by some unavoidable accident, not the fault of the defendant, then you will find for the defendant." Defendant then asked the court to instruct the jury as follows: "(3) That before you can find for the plaintiff for an injury which occurred to him in the state of Missouri, you must find by a preponderance of the evidence that defendant had either bought or leased said road, running in the state of Missouri, or that it had legally consolidated with its road, which was a corporation under the laws of the state of Arkansas. (4) I charge that the plaintiff has alleged that the road where the injury to him occurred was a corporation under the laws of the state of Arkansas; that this is denied by the defendant; that the burden of proving this fact by a preponderance of evidence is on the plaintiff; and that before you can find for him you must find that the defendant had bought or leased said road running where the injury occurred, or that it had been legally consolidated into the road, which 'is a corporation in the state of Arkansas.'" The court refused to give instructions Nos. 3 and 4, and defendant at the time excepted. The jury found for the plaintiff, and assessed damages at \$1,000. Defendant filed a motion for a new trial, and set up (1) that the verdict is contrary to the evidence; (2) that the verdict is contrary to law, and that the verdict is contrary to both the law and evidence; (3) because the court erred in refusing to give instructions Nos. 3 and 4, asked for by defendant, against objection of defendant, and in giving instructions 3 and 4 asked for by the plaintiff over objection of defendant; (4) because the damages given by the jury are excessive, unreasonable, and were given under passion and prejudice. The court overruled the motion for a new trial. Defendant excepted, and appealed to this court.

The appellant's counsel insist that the injury, if any, was received in the state of Missouri, on the Missouri & Arkansas Railway, which is a corporation existing in said state, and organized under its laws, and that no action will lie in Arkansas, unless it be shown, first, that the Eureka Springs Railway Company had purchased or leased the road owned by the Missouri corporation, or that said road had been legally consolidated with the Arkansas road, as provided in sections 5511, 5516, Mansf. Dig., and cites authorities to show that a corporation can exist only in the state of its creation. The complaint alleges, however, and the answer does not deny, that the Eureka Springs Railway Company was oper-

ating its trains over the other road at the time the accident occurred, and therefore, if the evidence warrants, the company is liable at common law, being at the time a common carrier. In the absence of proof to the contrary, the courts of this state will presume the common law to be in force in another state. *Thorn v. Weatherly*, 50 Ark. 237, and cases cited.

The appellant reasons with much force in urging his objection to the expression in the fourth instruction given for appellee, that, "before defendant can excuse itself, it must show by a preponderance of testimony that its track and machinery and appliances were the best of the kind, and in perfect condition;" objecting especially to the latter clause, "and in perfect condition." Conceding that that this would be objectionable without qualification, yet it is qualified by instructions 1 and 2 given for the defendant (appellant), which correctly charged the law.

Liability as
common
carrier.

The car leaving the track was *prima facie* evidence of negligence. This presumption may be rebutted by showing that the injury arose from an unavoidable accident, or an occurrence which could not have been prevented by the utmost skill, foresight and diligence. Railways are not insurers of passengers. But passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and if an injury occurs, by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the damage occurs, the carrier is responsible. *George v. St. Louis, I. M. & S. R. Co.*, 34 Ark. 613; 1 Am. & Eng. R. Cas. 294; *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 13 Am. & Eng. R. Cas. 10, and cases cited. It was within the province of the jury to determine the facts, and it is a settled principle of law that, where there is any evidence to support a verdict, a judgment will not be reversed upon the evidence. Finding no substantial error, the judgment is affirmed.

Evidence of
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- Obligation to construct over right of way. Court of chancery held to have jurisdiction to compel specific performance. *Montclair Tp. v. New York & G. L. R. Co. (N. J.).* 342.
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